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CONVEYANCER'S NOTEBOOK

PRELIMINARY INQUIRIES AND REQUISITIONS

A subscriber writes to ascertain the views of our readers on the propriety of a so-called requisition asking the vendor to confirm that, if the preliminary inquiries were repeated as requisitions, the replies would be the same or to give particulars of any variation. He points out that the practice of delivering lengthy preliminary inquiries is of comparatively recent growth and that many of these inquiries would before the war have been regarded as on points to be ascertained on inspection or by inquiry of the agent. Our correspondent suggests that possibly the origin of this so-called requisition is the dictum of Danckwerts J. in *Goody* v. *Baring* [1956] 2 All E.R at p. 16, where he said: "It is still the duty, however, of a purchaser's solicitor to make the appropriate requisitions and inquiries after the formal contract is signed, even if the preliminary inquiries have been so complete that it is only necessary to ask whether the answers these received are still complete and accurate."

Gibson's *Conveyancing* (18th ed.), at p. 167, puts the matter thus: "Requisitions must be framed with a regard to the nature of the particular title in respect of which they are made, and also to the restrictions under which the purchaser is placed by the contract, or by law, although in practice unenforceable requisitions are often made in the hope of obtaining some information." It will also be remembered that *Re Ford and Hill* (1879) 10 Ch.D. 335 struck down the general requisition. Many preliminary inquiries are not the proper subject of requisitions. Our correspondent objects to the so-called requisition under discussion on the grounds

(i) that it duplicates work, (ii) that the preliminary inquiries and the replies to them spend their force when the contract is entered into, and (iii) it gets in a lot of improper requisitions by a side-wind. He asks whether any of our readers or we can suggest cases in which a variation in the answer to a preliminary inquiry after contract can have any effect upon the bargain arrived at between vendor and purchaser where the answer as originally given was correct. We shall be glad to hear the views of our readers. At the same time they may care to ponder another question put to us recently: what effect has a false answer to a requisition?

Loss of the Deposit

In the last issue (*ante*, p. 84) we referred to *R.* v. *Pilkington* (1958) 42 Cr.App.R. 233, on the question on whom the loss falls where an estate agent makes away with a deposit before any contract is signed. The accused turned up as defendant in *Ryan* v. *Pilkington* [1959] 1 W.L.R. 403. There he was instructed as estate agent by the vendor to find a purchaser and he found one, the plaintiff, who agreed to buy subject to contract. The estate agent, unknown to the vendor, took two deposits from the purchaser signing one receipt as "agent" for the vendor and the other as "agent" *simpliciter*. No contract was in fact entered into and the purchaser sued the estate agent and the vendor for the return of the deposits. It was common ground that an estate agent has implied authority to accept a deposit as stakeholder. The Court of Appeal unanimously held that he has ostensible authority to accept a deposit as agent and consequently the vendor was liable.

It seems to have been assumed that had the estate agent taken the deposit as stakeholder the vendor would not have been liable. Mr. Pilkington may be reflecting rather ruefully that in the case of the deposits the subject of the charge in the prosecution he did not give the receipts in the same form.

The User Clause and Business Tenancies

Earlier this year (*ante*, p. 1) we considered the implications of a user clause in leases and pointed out that if a landlord demanded a narrow clause the rent under the Landlord and Tenant Act, 1954, might be reduced. In *Gorleston Golf Club* v. *Links Estate* (*Gorleston*) [1959] 2 C.L. 151, it was the tenant who was asking for a narrow clause. Under the existing tenancy the user was restricted to a golf course and the tenant sought a renewal with the same restriction. The county court judge held that, as, under

section 34 of the Act, he had to have regard to the terms of the existing tenancy (other than those relating to rent), the rent should be fixed at that appropriate to a golf club, retaining the restriction on user. With respect, this is entirely out of line with the generally accepted principle that the rent for the new term is to be the open market rent: the golf club, if not precisely put in possession of a saleable asset (see *Gold* v. *Brighton Corpn.* [1956] 1 W.L.R. 1291, 1294), was put in possession of a counter of considerable value for bargaining with the landlord.

Commencement of New Lease of Business Tenancy

Under the Landlord and Tenant Act, 1954, although a tenancy of business premises comes to an end on the expiration of the appropriate notice to terminate or request for a new tenancy, section 64 provides that if subsequently an application is made to the court the tenancy shall not terminate before the expiration of three months beginning with the date on which the application is finally disposed of. This may be reasonable where a new tenancy is not granted—though, owing to the possibility of appeals, this may be very unfair to the landlord—but one might be pardoned for thinking that the section was not intended to apply where a new tenancy is granted. After all, if a tenant makes a request for a new tenancy he must state the date from which the new term is to run (Form 8), and it does not seem logical that, having stated the date in his request, and, presumably, his originating application, the court should order the term to run from a date which can only be determined retrospectively when time for appeal has expired or an ultimate appeal finally determined. Nevertheless, in *Re No. 88 High Road, Kilburn* [1959] 1 W.L.R. 279 (noted *post*, p. 231), Wynn-Parry J. held that he could not escape from this construction.

COMMON LAW NOTICES AND BUSINESS TENANCIES

By R. E. Poole, ll.m., Solicitor

At common law, the principles which apply on the expiration of a tenancy are generally the same whether the tenancy has come to an end because of the expiration of a term of years or because of the service of a notice by one of the parties. When Part II of the Landlord and Tenant Act, 1954, applies to a tenancy for a term of years, and the term expires by effluxion of time without either party having taken any step to determine the tenancy in the manner prescribed under the Act, the tenancy continues in existence until one of the parties takes such a step. It continues, however, on somewhat altered terms: for instance, the tenant may bring it to an end on any quarter day by not less than three months' notice in writing.

It seems not unreasonable to conclude from this that where a tenancy within the Act is the subject of a notice which would have sufficed to determine it at common law but which does not satisfy the requirements of the Act, the effect will be the same (unless the Act provides otherwise) as if a term of years had expired; that is, that the notice will not be totally ineffective, but will transform the tenancy into an interest of the same kind as that which the Act provides for a tenant for a term of years after the term has expired. In this article an attempt will be made to consider whether the words of the Act and its interpretation by the courts in fact permit such an assumption.

The possibility that the Act embodies a distinction between the "contractual" aspect of a tenancy, which determines according to the rules of common law, and its "business" aspect which may survive the determination of the "contractual" aspect and can only be extinguished by the procedure laid down under the Act, has been indicated by several decisions of the courts. The distinction has usually been expressed in the form of a reference to a "business statutory tenancy," as opposed to the "contractual tenancy." This way of putting it was introduced by Sellers J. in *Castle Laundry (London), Ltd.* v. *Read* (*a*), and has been criticised mainly on the ground that it draws an unjustified analogy with the "statutory tenancy" created by the Rent Acts.

(*a*) [1955] 1 Q.B. 586.

The use of the expression "business statutory tenancy" has, however, become established as a convenient name for the interest preserved by the Act.

That the contractual aspect can, at least in some cases, be terminated by notice by one of the parties, leaving the tenancy subsisting on the statutory terms, was shown by the decision of Harman J. in *Weinbergs Weatherproofs, Ltd.* v. *Radcliffe Paper Mill Co., Ltd.* (*b*), where the contractual tenancy was brought to an end by the landlords serving a notice under a "break clause" in a lease. The possibility that there may be a severance of the "contractual" and "business" aspects of a tenancy in other cases as well has now been suggested by certain features of the judgments of the Court of Appeal in *Brown* v. *Jamieson* (*c*).

In considering this question, a notice in exercise of an option to determine a term of years under a "break clause" will have to be distinguished from a notice to determine a periodic tenancy. Although both kinds of notice are commonly known as "notices to quit" and are both capable of coming within the definition of that expression in the Act, it does not seem that what is true of one is necessarily true of the other, so far as the Act is concerned, since they have been differently treated by the courts in decisions under the Act. A notice served by a landlord has also to be distinguished from a notice served by a tenant, so that there are four alternatives to be examined.

Landlord Exercising Option to Break

The case where a landlord serves a notice under a "break clause" is the only one so far on which we have clear judicial authority. In the *Weinbergs* case there was a term of twenty years from September 29, 1950, and the lease contained a proviso giving either party the right to determine it at the expiration of the first seven or fourteen years of the term by giving to the other six months' notice of his desire to do so. In purported exercise of this power, the successors in title of the original landlords served a notice to put an end to the term on September 29, 1957; the notice was in accordance with the requirements of the lease, but not with those of the Act. Harman J. held that the notice sufficed to abridge the lease at that date, with the result that the tenants remained in occupation after that merely by the effect of the statute. He came to this decision on the ground that "the principle must be that the bargain should not be altered by the statute more than is necessary to give the statute its proper effect."

(*b*) [1958] Ch. 437.
(*c*) [1959] 2 W.L.R. 156.

The operation of this principle would clearly be capable of extending to other cases as well as the one in issue.

Tenant Exercising Option to Break

The position which would arise in the case of a tenant serving a notice under a "break clause" may be considered in the concrete form of an inquiry whether the effect would have been the same if it had been the tenants in the *Weinbergs* case who had served the notice instead of the landlords. In considering this, it must be borne in mind that section 24 (2) of the Act provides that the extension of the tenancy by the Act is not to prevent the coming to an end of a tenancy by notice to quit given by the tenant, and section 69 (1) defines "notice to quit" as "a notice to terminate a tenancy (whether a periodical tenancy or a tenancy for a term of years certain) given in accordance with the provisions (whether express or implied) of that tenancy." Hence, if the tenant's notice falls within this definition, it will destroy the tenancy in all its aspects.

Could the tenants have so framed their notice as to exercise validly their right to bring the term to an end, without making it a "notice to quit"? A tenant might quite possibly wish to do so; for instance, if the tenants in the *Weinbergs* case had not wished the lease to go on until 1964, but did not want to have to vacate the premises until, say, March 25, 1958, there seems no reason why it would have been improper for them to make use of the machinery of the Act, if they could, to produce this result.

The requirement in the statutory definition that a notice to quit shall be given in accordance with the provisions of the tenancy, whether these are express or implied, presumably means that in order to constitute a notice to quit for the purposes of the Act, a notice must satisfy the common law requirements for a notice to quit. If so, it must be such as "on a reasonable construction of it, denotes an intention to give up the premises at the lawful time," as Parke B. put it in *Goode* v. *Howells* (*d*). These words, and similar expressions in other decisions at common law, were naturally addressed more particularly to the need for the notice to indicate a definite date for the expiration of the tenancy, rather than an unequivocal intention by the tenant to vacate the premises. At common law the possibility of a tenant remaining lawfully in possession after the contractual tenancy had expired, against the will of his landlord, could scarcely arise. Hence the mere naming of a date on which the notice was to expire was tantamount to the

(*d*) (1838) 4 M. & W. 198. 201.

expression of an intention to give up possession on that date. If, however, the tenants in the *Weinbergs* case had served a notice that they intended to determine the lease on September 29, 1957, but without prejudice to their right to remain in occupation by virtue of section 24 of the Act, it seems arguable that this would have sufficed to exercise their option to break the lease, but would not have been a good common law notice to quit, and would thus have enabled them (at least in the absence of any action by the landlords to exercise their rights under the Act) to remain in occupation and in due course to serve a notice under section 27 (2) to determine the tenancy on a later quarter day.

Landlord's Notice to Quit Periodic Tenancy

Some possibility that the decision in the *Weinbergs* case may cover a landlord's notice to determine a periodic tenancy is indicated by *Brown* v. *Jamieson*. In that case the landlord of shop premises served the tenants with notice to quit at a time when the premises were within the Rent Acts and so not within the protection of the 1954 Act. The notice would admittedly have been valid to determine the tenancy if the premises had remained within the Rent Acts, but during the currency of the notice the Rent Act, 1957, came into force, and the premises thereupon ceased to be controlled by the Rent Acts, and instead came within the scope of Part II of the 1954 Act. The notice did not comply with the requirements of this Act, but the Court of Appeal held that it was saved by section 24 (3) (b). For the purpose of the present discussion the interest of the case lies in the fact that the county court judge who first tried it held that though the contractual tenancy between the parties had come to an end, the tenants were still entitled to retain possession until their right was determined by a notice to quit which complied with the regulations made under the 1954 Act. In other words, he apparently considered that the landlord's notice was not saved by section 24 (3) (b) but nevertheless had the same effect as the landlords' notice in the *Weinbergs* case. The landlord appealed successfully against this decision; but Lord Cohen, in his dissenting judgment in the Court of Appeal (in which alone the nature of the county court judge's decision is set forth in the report) considered that the appeal should be dismissed. He therefore seems to have agreed with the county court judge's interpretation of the Act. The judgments of the other members of the Court of Appeal (Lord Evershed M.R. and Sellers L.J.) were not necessarily inconsistent with this interpretation, since they held that section 24 (3) (b) rendered the landlord's notice entirely effective, and they did not

therefore have to consider whether the notice would have had any effect if the section had not saved it. However, Lord Evershed M.R. rejected, in passing, a suggestion that the landlord's notice had been effective only to determine the contractual tenancy, in terms which will be discussed in greater detail below.

The decision of the county court judge seems nevertheless open to some objections which so far as appears from the report were not taken in the Court of Appeal. In the first place section 27 (2) of the Act, when setting forth the manner in which a tenant with a tenancy prolonged by the Act may determine his tenancy, refers only to "a tenancy granted for a term of years certain which is continuing by virtue of section 24 of this Act," so that it seems fairly clear that the draftsman of the Act contemplated that a periodic tenancy coming within the Act could not be affected at all by any notice which did not comply with the statutory requirements. Secondly, the county court decision seems inconsistent with the decision of Devlin J. in *Orman Bros., Ltd.* v. *Greenbaum* (*e*), affirmed by the Court of Appeal (*f*). In that case a notice to quit which did not satisfy the statutory requirements was served by the landlord at a date before the Act came into force, but after regulations prescribing forms of notices for the purposes of the Act had been brought into operation, and it was held that the notice had failed to bring the tenancy to an end and was not saved by section 24 (3) (b). Although the report does not expressly state that Devlin J. and the Court of Appeal considered the notice to be totally ineffective, this seems to be implicit in their judgments. If a notice served before the Act came into force was a nullity, it seems highly doubtful whether a similar notice served after the Act came into force could have any effect (*g*).

The ground on which Lord Evershed M.R. rejected the suggestion that the notice in *Brown* v. *Jamieson* was effective to determine the contractual tenancy, so as to leave the tenants in the position of "statutory business tenants" was that "if this point were correct, it would apply equally, so far as I can see, in what is called the obvious case taken by Devlin J. of a residential

(*e*) [1954] 1 W.L.R. 1520.

(*f*) [1955] 1 W.L.R. 248.

(*g*) In *Rhyl U. D. C.* v. *Rhyl Amusements, Ltd.* [1959] 1 W.L.R. 465, the interest of the defendants was held to be a yearly tenancy determinable on May 1 or November 1 in any year. The plaintiffs as landlords served a common law notice to quit on June 10, 1954, expiring on May 1, 1955, and Harman J. appears to have considered that the coming into force of the Act rendered this notice totally ineffective to alter the position of the tenants. The facts and the decision, therefore, seem in this respect to be in accordance with those in *Orman Bros., Ltd.* v. *Greenbaum*. Harman J. also distinguished the *Weinbergs* case and *Castle Laundry (London), Ltd.* v. *Read* on the ground that they dealt with break clauses, and had no bearing on the facts then before him.

tenant adopting a business user after the receipt of the notice to quit." These words were, however, addressed more particularly to the conditions in which a notice would remain effective notwithstanding a change of circumstances bringing the premises within the Act, so that they are not necessarily of assistance in considering whether a notice not complying with the statutory requirements could ever have any effect (*h*).

Tenant's Notice to Quit Periodic Tenancy

Lastly, it has to be considered whether a tenant under a periodic tenancy could determine the contractual tenancy in such a way as to enable him to remain in possession under the Act. Here there seems to be no authority to go on at all, except that an attempt by the tenant to do so would be open to the same objections as those mentioned above in the case of a notice by the landlord, and also to the difficulty that, as in the case of a tenant's notice under a "break clause," the notice would not have to amount to a notice to quit as defined by the Act. This difficulty would seem to be indeed insurmountable in this case, since to have any effect at all the notice would have to be a good common law notice to quit, and thus effective in any case to destroy the tenant's entire interest by virtue of section 24 (2).

It is, therefore, by no means clear what is the principle to be applied in cases where one of the parties to a tenancy within the Act serves the other with a notice which would have been effective to determine the tenancy apart from the Act, but falls short of the statutory requirements. It remains to be seen, in the light of future decisions of the courts, whether the *Weinbergs* decision was a particular expression of a wider principle, or a solitary exception to a rule that a notice which does not comply with the requirements of the Act has no effect whatsoever.

(*h*) [Where a lessee of business premises has sublet part under a periodic tenancy the position is complicated by the fact that the lessee is the competent landlord until the superior lessor serves a notice to terminate or the lessee requests a new lease. If the lessee does not serve a common law notice to quit on the subtenant he may prejudice the superior lessor's position. It is hoped to consider the question of subtenancies in a subsequent article.—Ed.]

THE LAW OF HIGHWAYS

I. Highways, Highway Authorities and the Highways Act, 1959 *

By J. F. Garner, ll.m., Solicitor

The new Highways Act is designed to consolidate, with amendments (mostly of a minor nature), certain enactments relating to highways, streets and bridges in England and Wales, and to make "consequential amendments of the common law." Road traffic, in the sense that the expression is known to the lawyer, is not a major concern of the present Act, and therefore the Acts of 1930, 1934 and 1956, and the related statutes of recent years, are not greatly affected. In other respects, however, the Highways Act, 1959, deals with the whole of the statute law relating to highways, whether it has hitherto been contained in a Highways Act or a Public Health Act (*a*)—or even in the Model Clauses which contain a distillation, as it were, of what has been accepted for inclusion in local Acts on related subjects in recent years. This does not mean, however, that the new Act constitutes a complete code of highway law; although the common law is amended here and there, its basic principles have not been restated, and are substantially unaffected.

As will be expected by an English lawyer, therefore, the term "highway" is not defined in the Act (in spite of the headnote to section 294). A highway may be understood as consisting of a defined, made or unmade way, "which is common to all the King's people, whether it lead directly to a market town or only from town to town" (*b*), the essential feature being that all Her Majesty's subjects may pass and repass thereon as of right (*c*). It must also be remembered that "once a highway, always a highway"; mere disuse cannot deprive the public of their rights

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* This article is the first of a series on the subject.

(*a*) The Committee on whose report (Cmnd. 630) the draft Bill was based, also explain that the provisions relating to such matters as the numbering of streets and the provision of seats or public conveniences in streets, etc., were regarded as being matters rather of town government than of highway law, and therefore they are not included in the 1959 Act.

(*b*) 1 Hawkins' *Pleas of the Crown*, 32, s. 1, and see Pratt and McKenzie's *Law of Highways* (19th ed.), p. 1.

(*c*) Note that the right is only to pass and to repass; a passer-by on a highway cannot claim a right to annoy a neighbouring landowner: *Harrison* v. *Duke of Rutland* [1893] 1 Q.B. 142.

to enjoy a highway as such, whether it be a footpath or a main road. Whether this could be argued in respect of a road that has not been used as such since Roman times does not appear from the decided cases, but an obstruction of the public rights for as long as forty years does not destroy the status of a highway (*d*).

1. The Classification of Highways

Highways may be classified in two different ways, according to the extent of the user that may be made of them by the public, and according to the responsibilities for maintenance. First, as to the extent of user that may be made of the particular highway by the public; this user will always be simply to pass and repass, and the highway must normally have a *terminus a quo* and a *terminus ad quem* (*e*); the public cannot acquire a right to wander at will over privately owned land (*f*), except under an access order or agreement made under the National Parks and Access to the Countryside Act, 1949 (*g*). The classification of highways here depends on whether the public right may be exercised on foot only, on horseback, or with vehicles, etc.

(a) *Footpath.* A footpath is defined by section 295 (1) (replacing section 29 of the 1949 Act) as meaning "a highway over which the public have a right of way on foot only, not being a footway," and a "footway" is defined as being a "way comprised in a highway which also comprises a carriageway, being a way over which the public have a right on foot only"; this distinction between a "footpath" and a "footway," observed in practice but not hitherto established as such in law, is of importance because of the special rules for the creation and diversion, etc., of footpaths, which do not apply to footways, these being regarded for such purposes as part of the complete highways.

(b) *Bridleways* are highways "over which the public have the following, but no other, rights of way, that is to say, a right of

(*d*) In *R.* v. *Edwards* (1847) 11 J.P. 602, Williams J. said that no lapse of time of adverse enjoyment could deprive the public of the rights they once possessed. If the public had ever had the right to use the verges of the road, "however remote that time might be," the public were still entitled to it. Encroachments for over 40 years were therefore not sufficient to destroy public rights. This case was applied and followed in *Harvey* v. *Truro R.D.C.* [1903] 2 Ch. 638. Extinguishment under statutory powers is dealt with later in these articles.

(*e*) It is very difficult to make out dedication by user where the road so far as the public are concerned is a cul-de-sac: *per* Romer L.J. in *Whitehouse* v. *Hugh* [1906] 2 Ch. 283, but once user is established a cul-de-sac may be a highway: *Att-Gen.* v. *Chandos Land & Building Society* (1910) 74 J.P. 401.

(*f*) No *jus spatiendi* can be claimed by the public in respect of privately owned land: *Att.-Gen.* v. *Antrobus* [1905] 2 Ch. 188, whatever may be established as a private easement: *Re Ellenborough Park* [1956] Ch. 131.

(*g*) This portion of the 1949 Act is left unrepealed by the Highways Act, 1959.

way on foot and a right of way on horseback or leading a horse with or without a right to drive animals of any description [this right is sometimes called a 'drift-way'] along a highway" (*h*).

(c) A "*cycle track*" means (*h*) "a way constituting or comprised in a highway, being a way over which the public have the following, but no other, rights of way, that is to say, a right of way on pedal cycles with or without a right of way on foot." The power to construct a cycle track is for the first time given to all highway authorities by section 66 of the 1959 Act; previously such tracks could, apparently, be constructed only as part of trunk roads (*i*).

(d) "*Carriageway*" means (*h*) "a way constituting or comprised in a highway, being a way (other than a cycle track) over which the public have a right of way for the passage of vehicles" (*k*).

It will be noticed that the word "*road*" is not defined at all in the 1959 Act, and it has no precise legal meaning. There are particular kinds of roads—"trunk roads" and "special roads" vested in the Minister of Transport and Civil Aviation, and classified and unclassified roads vested in the several types of highway authorities as hereafter discussed, but these are all carriageways and the public have similar rights in respect thereof (subject only to the special provisions mentioned in footnote (*k*)).

A "*street*" is defined in section 295 (1) of the 1959 Act as including "any highway and any road, lane, footpath, square, court, alley or passage, whether a thoroughfare or not," and the term also includes any part of a street. This word "street" is used in several sections of the 1959 Act, especially those dealing with the siting of buildings fronting on a highway (*l*). The definition (slightly modified) comes from the Public Health Act, 1875, s. 4, and in this context it has been held that for a particular

(*h*) Highways Act, 1959, s. 295 (1).

(*i*) Trunk Roads Act, 1946, s. 3 (2), which has now become s. 7 (3) of the 1959 Act.

(*k*) This is, of course, the type of highway (which may or may not, as a whole, include a footway and a cycle track) in respect of which the public have the widest number of rights of user. The kinds of traffic that may be allowed on a special road may be regulated by order under s. 12 of the 1959 Act, and private rights of access may be stopped up under s. 18. "Traffic," somewhat strangely, includes pedestrians and animals (see s. 295 (1)), and "pedestrians" are one of the classes of traffic that could be excluded from a special road (see s. 12 and Fourth Schedule), thereby taking away the subject's common law right to walk on the Queen's highway. In the U.S.A., some argument has been caused by the inauguration of similar roads, on the basis that a frontager deprived of his access to a trunk road is entitled to redress under the "due process" clause of the Constitution, or even that State legislation providing for such a road is *ultra vires* on this ground: see, *e.g.*, "The Diminishing Fee," in 20 *Legal and Contemporary Problems*, 351, by H. M. Cross.

(*l*) See, *e.g.*, s. 75, replacing s. 3 of the Public Health (Buildings in Streets) Act, 1888.

way to be a "street" there must be a succession of houses and buildings on at least one side (*m*). It will be noticed that a street need not necessarily be a highway at all, and therefore a private way may be made up, if thought desirable, by the local authority at the expense of the frontagers under Part IX of the 1959 Act (*n*).

Secondly, highways may be classified by reference to the responsibility for maintenance. Before the 1959 Act became law it was the general principle of the common law, enforceable by the cumbrous procedure of indictment before quarter sessions, that all highways were repairable by the inhabitants at large; "new" highways, however (*o*), created after the passing of the Highways Act, 1835, and not formally adopted by the highway authority (and not constructed by them) were not so repairable. The 1959 Act has made a number of changes in the common law here, as a result of which there are now "highways maintainable at the public expense" and highways not so maintainable (*p*). All maintainable highways are the express responsibility of the highway authority for the particular highway; no duty to repair or "maintain" now falls on that amorphous body, the "inhabitants at large." The several classes of maintainable highways are described hereafter, when the different types of highway authorities in which they may be vested are described. Some non-maintainable highways may, by declaration made under the Second Schedule to the Public Utilities Street Works Act, 1950 (*q*), be declared to be "prospectively maintainable highways"; this declaration of status is of importance only in connection with the provisions dealing with the breaking-up of streets for the purposes of statutory undertakers under the Act of 1950 (*r*).

Highways not maintainable at the public expense are none the less highways; they may be used by the public as carriageways, bridleways or footpaths, according to the extent of the rights of user that have been acquired on behalf of the public.

2. Highway Authorities

Practically every local authority is capable of being a highway authority, but this does not mean necessarily that a particular local authority is the highway authority in respect of all the maintainable highways in its area. All maintainable highways

(*m*) *Att.-Gen.* v. *Laird* [1925] Ch. 318.
(*n*) Replacing the Public Health Act, 1875, s. 150, and the Private Street Works Act, 1892.
(*o*) Except for footpaths at the sides of roads: see *Robinson* v. *Richmond Corporation* [1955] 2 W.L.R. 333.
(*p*) See Report of Committee, p. 16.
(*q*) *Not* repealed by the 1959 Act.
(*r*) The enforcement of the duty to maintain a highway is discussed later.

are, however, vested in the highway authority appropriate to the particular type or class of highway (*s*). First it is necessary to describe what highways are in law maintainable at the public expense (see 1959 Act, s. 38). These are:

(a) any highway maintainable by the inhabitants at large or by a highway authority immediately before the passing of the 1959 Act;

(b) any highway constructed by a highway authority after that date;

(c) any highway constructed by the council of a borough or urban district within their own area under Part V of the Housing Act, 1957, or a highway so constructed by any local authority outside their own area; this particular provision means that in future housing authorities will not find it necessary formally to "adopt" as maintainable highways roads constructed by them on their housing estates;

(d) trunk roads and special roads;

(e) footpaths and bridleways created or dedicated in consequence of a public path creation order, a public path diversion order or a public path creation agreement.

The several highway authorities are:

(a) *The Minister of Transport and Civil Aviation* is the highway authority for any trunk road (*t*), any road in respect of which it is expressly provided by statutory order that he shall be the highway authority (*u*), or for any road constructed by the Minister, except where a local highway authority is the highway authority (*a*).

(b) *A county borough council* is the highway authority in respect of all highways (maintainable at the public expense or not) within the borough, except those in respect whereof the Minister is the highway authority as above mentioned.

(c) *A non-county borough or an urban district council* (*b*) is the highway authority for all the highways (maintainable at the public expense or not) within the borough, except those in respect whereof the Minister (see above, para. (a)), or the county council (see below, para. (d)), is the highway authority.

(*s*) 1959 Act, s. 226. Highways not maintainable at the public expense are not vested in the highway authority, but there is still a highway authority in respect of such a highway as they have certain powers in respect thereof: *e.g.*, s. 71 (width of highways) and s. 86 (provision of boundary stones).

(*t*) See 1959 Act, s. 1.

(*u*) Made under, *e.g.*, s. 49 (2) (b) of the Town and Country Planning Act, 1947.

(*a*) As in the case, for example, where an order has been made under s. 9 (1) (b) of the 1959 Act.

(*b*) Both of which, together with rural district councils, may be described as "district councils."

(d) *A county council* (*c*) is the highway authority for all highways (maintainable at the public expense or not) situate in a rural district in the county and not being highways in respect whereof the Minister is the highway authority, for all county bridges (*d*) in the county, and for all county roads in a non-county borough or urban district within the county in respect of which the borough or urban district council is not the highway authority. "County roads" is defined at length in section 21 of the Act, and these are, broadly speaking, what have hitherto been known as "classified roads." Whether a particular road has the county council or the borough or urban district council as its highway authority depends (see section 4) on whether the borough or urban district council is entitled to maintain the road, and this means, in short, whether the council, having a population exceeding 20,000 at the latest census, has decided to exercise its rights to "claim" the road; where such a council has so exercised its rights in relation to a particular county road, that road (which must be a highway maintainable at the public expense) is referred to as a "claimed county road." A non-county borough or urban district council is thus the highway authority for all footpaths, bridleways and minor roads in its district, and also for its claimed county roads (if any). In practice there is no means of knowing, otherwise than by asking the authorities concerned, which particular authority is the highway authority for a specified piece of road; even the Ministry of Transport route numbers are no more than a guide. A Class "A" road may be a trunk road, a county road, a claimed county road, or even a district road.

(e) *A parish council* is not a highway authority at all, but under section 46 of the 1959 Act (*e*) it may undertake the maintenance of any footpath or bridleway in the parish which is a highway maintainable at the public expense, although the exercise of this power will not affect the continuing duty of the highway authority (the county council) to maintain the path or way.

A rural district council is not a highway authority at all, but in common with other county district councils (*f*) it has a duty under section 116 (3) of the 1959 Act "to assert and protect the rights of the public to the use and enjoyment of all highways in their district," and to prevent the obstruction or stopping up of

(*c*) Which cannot, of course, include any county borough within its area. An administrative county is not necessarily co-extensive with the geographical county.
(*d*) See below.
(*e*) Replacing s. 13 (2) of the Local Government Act, 1894.
(*f*) *i.e.*, non-county borough and urban district councils.

such highways. In practice, of course, this duty falls to be exercised most frequently in respect of footpaths and bridleways, and since the completion of surveys of public rights of way by the county councils under Part IV of the National Parks and Access to the Countryside Act, 1949 (*g*), it has not often fallen to a district council to have to exercise this duty. The duties of the highway authority may, however, be delegated to any county district council by the county council (*h*).

3. Bridges and Ferries

As a general rule, where a highway (of any status) passes over a bridge or through a tunnel, that bridge or tunnel is to be taken, for the purposes of the Act, as being a part of the highway (*hh*). Consequently, a bridge carrying a highway maintainable at the public expense will itself be so maintainable by the highway authority for the particular highway. Section 23, however, provides that certain bridges, in particular those which the county council were liable to maintain immediately before the commencement of the Act, and bridges adopted by the county council or constructed by them, shall be "county bridges," and so maintainable by them (see s. 1 (3) (c)). This provision very greatly simplifies the law, which had become quite unnecessarily complicated, as the prima facie liability at common law to repair a bridge rested on the county, but by immemorial usage or custom the inhabitants of a place, such as a hundred or a borough, could have become liable to repair a particular public bridge.

A highway may consist of a way by water, and a navigable river, a ferry or an inland lake which is free and open to the public is governed by the general principles of law applicable to highways generally (*i*). The Highways Act, 1959, does not concern itself with the general law relating to ferries, but a highway authority may, with the approval of the Minister, provide and maintain road ferries (*k*), improve any road ferry provided by them (*l*), and acquire compulsorily or by agreement any land they may require for the purpose of providing or improving a road ferry in the exercise of their powers (*m*). A "road ferry" is defined (*n*) as

(*g*) These sections of the 1949 Act have not been consolidated in the 1959 Act.
(*h*) 1959 Act, s. 24; this power is not often exercised in favour of a rural district council.
(*hh*) 1959 Act, s. 294 (2).
(*i*) Pratt and McKenzie's *Law of Highways* (19th ed.), p. 7.
(*k*) 1959 Act, s. 26 (3); if the Minister is himself the highway authority, no approval is required.
(*l*) *Ibid.*, s. 107.
(*m*) *Ibid.*, s. 220.
(*n*) *Ibid.*, s. 295 (1).

meaning " a ferry connecting the termination of a highway which is, or is to become, a highway maintainable at the public expense with the termination of another highway which is, or is to become, such a highway."

A towpath at the side of a river or canal is not excluded from being a footpath or bridleway by reason only that the public have a right to use it for the purposes of navigation (*o*).

4. Ownership of Highways

Section 226 of the 1959 Act provides that every highway maintainable at the public expense, " together with the materials and scrapings thereof " (*p*), shall vest in the highway authority—the Minister or the local authority—for that particular highway. The opportunity has not been taken in the Act to explain precisely the meaning of the vesting operation, and therefore, presumably, the pre-1959 case law will still apply.

The owner of the land abutting on the highway (whether maintainable at the public expense or not) is presumed, subject to the contrary appearing from deeds of the property (*q*), to own the subsoil of the highway, subject to the rights of the public to pass and repass over the surface, *ad medium filum*. These rights of ownership are also subject to the rights of the highway authority conferred by virtue of the above statutory provision and its predecessors. If, on the other hand, the highway has been constructed by the highway authority on land purchased by them under statutory powers (*r*) for that specific purpose, the whole of the land will, of course, belong to the highway authority *usque ad coelum et ad inferos*.

The rights given to a highway authority by virtue of the statutory provision for " vesting " are only sufficient, however, to enable them to exercise their duty as highway authority, or, as it has been said (*s*), " as is necessary for the control, protection and maintenance of the street as a highway for public use," or, in a more homely phrase, relates only to the " top two spits " (*t*).

This question of ownership of the highway is of considerable importance in a number of contexts:

(*o*) *Ibid.*, s. 295 (2).

(*p*) This is an expression taken from s. 41 of the Highway Act, 1835. It is not clear what is meant precisely by " scrapings," but it almost certainly would not include property of value found abandoned on a highway.

(*q*) As in, *e.g.*, *Mappin Brothers* v. *Liberty & Co., Ltd.* [1903] 1 Ch. 118.

(*r*) For example, under s. 214 of the 1959 Act.

(*s*) *Per* Lord Herschell, in *Mayor of Tunbridge Wells* v. *Baird* [1896] A.C. 434, at p. 442.

(*t*) *Per* Denning L.J. (as he then was), in *Tithe Redemption Commissioners* v. *Runcorn U.D.C.* [1954] Ch. 383, at p. 407.

(a) What exactly may be erected in a highway; if no statutory authority exists for the erection of, *e.g.*, a lamp standard, a traffic sign or a refuse bin, the object in question will be a highway nuisance (*u*), and any person suffering damage as a consequence of its existence in the highway will have a remedy in law.

(b) Who may give consent to the breaking up of a highway and the placing of lines, mains or apparatus, etc., therein. The rules of procedure to be followed by statutory undertakers in any case of breaking open the surface are contained in the Public Utilities Street Works Act, 1950 (*a*), and in the case of a highway maintainable at the public expense, or one which has been declared under the 1950 Act to be a "prospectively maintainable highway," the consent of the highway authority has (in most cases) to be obtained; in other cases (*b*) the consent of the "street managers" (*i.e.*, the frontagers) must first be obtained. Normally statutory undertakers possess specific powers to place their apparatus, etc., under the soil of a highway (*c*), but complications may arise where a private individual wishes to lay a private drain or water supply pipe under the soil of a private street (*d*).

(c) The question of the payment of tithe redemption annuity has been settled in a recent case (*e*); rates and taxes are not charged in respect of highways.

(d) Nuisances may be caused to the occupiers of adjoining property by objects in the highway such as trees (*f*), or the discharge of liquids (*g*), and the occupier of land adjoining the highway may himself be liable for nuisances caused to the highway (*h*). In order that proceedings may be defended or instituted in such circumstances, the status of the highway authority in relation to the particular highway would first have to be established.

(*u*) Discussed later in these articles.

(*a*) Not affected in this respect by the Act of 1959.

(*b*) This applies to any "street" within the definition of s. 1 (3) of the 1950 Act, which is so wide as to include a piece of land laid out as a way "whether it is for the time being formed as a way or not."

(*c*) See, for example, s. 13 of the Schedule to the Electric Lighting (Clauses) Act, 1899, as amended by the Electricity Act, 1947, providing for the construction of "street boxes" by electricity boards.

(*d*) See article by the present writer at (1950) 14 Conv.(N.S.) 295.

(*e*) *Tithe Redemption Commission* v. *Runcorn U.D.C.*, *supra*.

(*f*) As for example in *Butler* v. *Standard Telephones, Ltd.* [1940] 1 All E.R. 121.

(*g*) *Dell* v. *Chesham U.D.C.* [1921] 3 K.B. 427.

(*h*) Discussed later in these articles.

(e) Where a piece of land is dedicated as part of the highway, whereby it vests in the highway authority, do the authority thereby require an interest by "sale" within section 5 of the Town and Country Planning Act, 1954? (*i*).

The last is a somewhat specialised point, but perhaps enough has been said to show that the use of the term "vest" in section 226 does not imply as precise a juridical concept as could be desired. Often one finds when applying property ideas to administrative statutes of this nature that the legislature has not sufficiently thought the matter out (*k*). We are told that the consolidating 1959 Act is to be followed by a further, amending, statute on the same subject; perhaps in that statute the parliamentary draftsman may have the temerity to attempt a definition of "vesting" in this context.

5. Financial Provisions

Since the passing of the Local Government Act, 1958, specific Exchequer grants to local authorities by way of contributions in respect of particular functions have, as a general rule, been withdrawn, and replaced by general grants. This is not true so far as highway expenditure is concerned, however, and section 234 preserves the powers of the Minister of Transport and Civil Aviation to make advances either by way of grant (*l*) or loan to a highway authority for any of the following purposes:

(a) for the construction of a highway which is to be maintainable at the public expense;
(b) for the maintenance of a highway or its improvement;
(c) for the provision, maintenance and improvement of a road-ferry; or
(d) for the execution of works by a non-county borough or urban district council in a highway for which they are not the highway authority, under sections 65 (dual carriageways and roundabouts), 68 (pedestrian refuges) or 69 (subways for pedestrians).

The other sections in Part XI of the 1959 Act are mostly concerned with contributions for sundry highway purposes between one class of local authority and another; section 242 gives a general

(*i*) See article by the present writer at [1956] J.P.L. 488.
(*k*) A similar problem arises in connection with the use of the word "land": see article at (1957) 21 Conv.(N.S.) 141.
(*l*) The scales of grant are not prescribed in the statute, so presumably these will continue as heretofore. The Minister has to obtain the approval of the Treasury.

power to local authorities (*m*) to borrow money for the purposes of the Act, but as is pointed out by the Committee's Report (*n*), this will not override the general provision in section 195 of the Local Government Act, 1933, to the effect that the consent of the Minister of Housing and Local Government must be obtained before that power is exercised in any particular instance.

(*m*) The term used here is "council," which is defined (see s. 295 (1)) to include all local authorities except parishes.

(*n*) See p. 147 thereof.

THE VENDOR AS TRUSTEE

By V. G. Wellings, M.A.(Oxon), Barrister-at-Law

Two recent cases, *Re Hamilton-Snowball's Conveyance* (*a*) and *Abdulla* v. *Shah* (*b*), illustrate both the extent of and the limitations on the trusteeship which in equity is imputed to a vendor in the interval between the making of a contract for the sale of land and its completion. As from the date of a contract which is specifically enforceable the purchaser is treated in equity as owner of the land contracted to be sold: see *Shaw* v. *Foster* (*c*), *Lysaght* v. *Edwards* (*d*) and *Allen* v. *I. R. C.* (*e*). It is this which naturally gives rise to the rule that as from the date of the contract the vendor becomes trustee for the purchaser. The trusteeship is not absolute but is qualified both as to the property to which the trusteeship relates, and as to the extent of the vendor's duties as trustee.

1. The Property to which the Trusteeship Applies

The vendor is trustee only of the property contracted to be sold. Thus the purchaser as equitable owner is entitled to the benefit of all accretions to the property contracted to be sold and its value occurring since the date of the contract. Similarly, he must bear all losses occurring since that date, including destruction of the property by fire. But the purchaser formerly could not claim from the vendor money recovered by the vendor in respect of that destruction under his fire insurance policy, because the insurance policy and the vendor's rights under it were no part of the property contracted to be sold: see *Rayner* v. *Preston* (*f*). By section 47 of the Law of Property Act, 1925, where money becomes payable after the date of the contract under any policy of insurance maintained by the vendor in respect of any damage to or destruction of property included in the contract, then, subject to any stipulation to the contrary contained in the contract, to any requisite consents of the insurers and to payment by the purchaser of the proportionate

(*a*) [1958] 2 W.L.R. 951; [1958] 2 All E.R. 319; (1958) 22 Conv.(N.S.) 297 (Ch.D.).
(*b*) [1959] 2 W.L.R. 12 (P.C.); (1959) 23 Conv.(N.S.) 134.
(*c*) (1872) L.R. 5 H.L. 321, at 338, *per* Lord Cairns.
(*d*) (1876) 2 Ch.D. 499, at 506, *per* Jessel M.R.
(*e*) [1914] 1 K.B. 327.
(*f*) (1881) 18 Ch.D. 1.

part of the premium from the date of the contract, the money is on completion of the contract to be held or receivable by the vendor on behalf of the purchaser. *Rayner* v. *Preston* is therefore in effect overruled but the principle of the case is nevertheless applicable to sums of money received by the vendor in respect of matters unconnected with policies of insurance and with the property contracted to be sold. Thus, where the contract was for vacant possession of a house which, at the time of the contract, was subject to a lease, and the lease came to an end before completion, and the lessee paid to the vendor £2,060 for dilapidations under the covenants in the lease, it was held that the vendor was not liable to pay over that sum to the purchaser; the property contracted to be sold was not the house subject to and with the benefit of the lease, but the house with vacant possession, altogether apart from and independent of the lease, and the obligations and rights under the lease were simply and solely a matter between the vendor and the lessee: see *Re Lyne-Stephens and Scott-Miller's Contract* (*g*). The last-mentioned case and *Rayner* v. *Preston* were applied by Upjohn J. in *Re Hamilton-Snowball's Conveyance* (*h*). In that case the property contracted to be sold became derequisitioned between the date of the contract and the date of its completion, so that compensation under the Compensation (Defence) Act, 1939, became payable to the "owner," namely, the person who would be entitled to receive a rack-rent if the property were let at a rack-rent. It was conceded that the compensation was properly paid to the vendor as the person fulfilling that definition of "owner" (*i*), but it was contended that the vendor received the compensation as trustee for the purchaser. The contract was for vacant possession and contained no condition that the property was sold subject to the requisitioning. Upjohn J. held that the contract did not include or comprehend the compensation so that the vendor was entitled to keep it for his own benefit.

2. The Vendor's Duties as Trustee

The vendor's duties as trustee are qualified because, although the purchaser is the owner in equity, the vendor nevertheless retains a personal and substantial interest in the property contracted to be sold and the right to protect that interest is paramount: see

(*g*) [1920] 1 Ch. 472. The position would be the same if the money had been paid under a lease extending beyond the date of completion even if the contract were silent as to the lease and even if there were no express requirement that vacant possession should be given (because in these events the contract would be treated as one requiring vacant possession to be given). But if the sale was expressly subject to the lease the purchaser would be entitled to the money.

(*h*) *Supra.*

(*i*) But contrast *Allen* v. *I. R. C.* [1914] 1 K.B. 327.

per Lord Cairns in *Shaw* v. *Foster* (*k*). That interest comprises a right to the purchase-money, a charge or lien on the property for the security of that purchase-money, and a right to retain possession until the purchase-money is paid (*l*). The vendor's duty pending completion is "to use reasonable care to preserve the property in a reasonable state of preservation, and, so far as may be, as it was when the contract was made" (*m*). Besides requiring the vendor to take reasonable care to keep the premises in a reasonable state of repair, there can be little doubt that the vendor's duty, as expressed above, comprehends an obligation to take reasonable care to ensure that the property does not depreciate in value between the date of the contract and completion (*n*). Until the decision of the Judicial Committee of the Privy Council in *Abdulla* v. *Shah* (*o*), there was no case which decided that it could be the duty of the vendor, in a case in which the property appreciated in value between contract and completion, to take reasonable care to ensure that the enhanced value was not lost.

Abdulla v. *Shah* concerned a contract for the sale of rent-restricted property in Kenya where, it seems, the vendor's duties pending completion are much the same as in England. The contract was expressly subject to the existing tenancies of the property. After the contract was entered into the vendor, without notifying or consulting the purchaser, accepted a surrender of one of the tenancies, and on the same day, again without notifying or consulting the purchaser, relet the surrendered portion to a new tenant at the same rent as before, namely, the maximum controlled rent. In an action by the purchaser for specific performance with an abatement of 18,000s. in the purchase price, it was established that the value of the property with the surrendered portion unlet was 18,000s. more than with that portion let. It was conceded that if the purchaser had been consulted he would have wished the premises to remain vacant and would have been willing to guarantee to the vendors the loss of rent involved. The Judicial Committee held that the vendor had no right without consultation with the purchaser to diminish the value of the property as it was after the surrender by reletting and, in so holding, applied a passage from the judgment of Sir George Jessel M.R. in *Egmont* v. *Smith* (*p*):

(*k*) (1872) L.R. 5 H.L. 321, at 338.
(*l*) *Lysaght* v. *Edwards*, *per* Jessel M.R., *supra*.
(*m*) *Per* Lord Coleridge C.J. in *Clarke* v. *Ramuz* [1891] 2 Q.B. 456, at 460, and *per* Kay L.J. (the duty is "to take reasonable care that the property is not deteriorated in the interval before completion and whilst it is in his [the vendor's] possession"), *ibid.*, at 462.
(*n*) See *Foster* v. *Deacon* (1818) 3 Mad. 394.
(*o*) *Supra*.
(*p*) (1877) 6 Ch.D. 469, at 476.

"I have no doubt whatever that, on the general law, the duty of a trustee is to let the farms from year to year in order to obtain sufficient rent, and to keep the farms in a good state of cultivation. That, I have no doubt, is the general law. Whether the vacancy happen in the ordinary course of determining the tenancy either by the landlord or the tenant, or whether the vacancy happen because the landlord gave the notice at the request of the purchaser, appears to me as regards the subsequent liability wholly immaterial.

"I think it is the proper course that the vendor should give notice of the impending vacancy to the purchaser, and ask him what he wishes to be done; because if the purchaser says, 'I am willing to run the risk of the farms being unlet, and I will guarantee you against any loss that will arise to you in case the purchase goes off,' it might be a proper thing to allow them to remain unlet."

The judgment of the Committee added that in the circumstances prevailing in Kenya the reletting had the same effect in relation to value as the leaving vacant of agricultural land.

It is to be doubted whether Jessel M.R. in the second paragraph of the passage cited intended to lay down a general rule that it was the duty of the vendors not to relet premises falling vacant between contract and completion without consulting the purchaser. If he did so intend his remarks are *obiter*. In *Egmont* v. *Smith*, Lord Egmont had contracted to sell a farm subject to a yearly tenancy. At the request of the purchaser he gave notice to quit to the tenant determining the tenancy before completion. Lord Egmont then notified the purchaser that he intended to relet the farm. The purchaser acknowledged this letter but said nothing about the intention to relet and, accordingly, Lord Egmont relet the farm on a yearly tenancy. With regard to the purchaser's claim for specific performance of the contract, damages and an order for possession from the new tenant, Jessel M.R. said (*q*):

"Now I have to consider the position in law of a vendor who, having sold estates subject to yearly tenancies *which he is not compellable to determine*, at the request of and for the convenience of the purchaser gives notice to the tenant to leave. . . .

"What is his position? I think it is his duty, *as he has given the notices at the request of the purchaser*, which he was not compelled to do, at least before reletting the farms to consult the purchaser to know if he wishes them relet, and he should give him notice that he intends to relet them. *That it is his duty and obligation to relet them I have no doubt whatever.* . . .

"As a trustee it is his duty to keep the property in a proper state of cultivation, reasonable regard being had to incurring a

(*q*) *Ibid.*, 475 *et seq.* The italics in the passage cited are the author's.

liability on his part. No one can pretend for a moment that a trustee of farms performs his duty by allowing those farms, situate, perhaps, in one of the finest counties in England, and readily lettable, to remain unlet and run the risk of losing the rent. It cannot be pretended for a moment that a trustee who does that, or that a trustee who does that voluntarily and knowingly will not expose himself to a serious liability to the *cestui que trust* who loses his rent."

There then followed the passage relied upon by the Judicial Committee. Finally, Jessel M.R. said: "In my opinion his [the purchaser's] claim is utterly baseless and unfounded, for I cannot see how the vendors could, under the circumstances, assume otherwise than an assent on the part of the purchaser to their reletting, *even supposing they had not been required by law to relet*; and I should have held that they were exonerated by the correspondence from any liability for the reletting, even if my opinion as to the legal position of the parties had been different from what it is."

Egmont v. *Smith*, having regard to *Clark* v. *Ramuz* (*r*) which applied that decision, is therefore a decision on the facts that (i) the vendor would have failed in his duty to take reasonable care to preserve the property if he had not relet the farm, and (ii) because the first tenancy was determined at the request of the purchaser, it was the vendor's duty to consult the purchaser before reletting. The vendor had in fact consulted the purchaser and the words beginning "I think it is the proper course . . ." in the passage relied upon by the Judicial Committee really mean no more than approval of the course which the actual vendor in the case had actually taken. It is therefore thought that little support is to be found in *Egmont* v. *Smith* for the Judicial Committee's decision.

This does not mean that *Abdullah* v. *Shah* was necessarily wrongly decided. It, too, is to be treated as the application to its own facts of the vendor's duty as explained in *Clark* v. *Ramuz*. It may be very much more important that a farm should be relet in order to ensure continuity of cultivation than that a dwelling-house should be relet. However, there is no general rule that the purchaser must be consulted even before a dwelling-house is relet. The Judicial Committee specifically refused to consider the proposition that such a general rule existed (*s*). Much must depend on the vendor's knowledge of the purchaser's wishes and intentions. Some duty therefore rests on the purchaser to make his wishes clear to the vendor. A vendor may be justified in assuming that a

(*r*) *Supra*.
(*s*) [1959] 2 W.L.R. 17.

purchaser who buys subject to an existing tenancy, who therefore is not contracting for vacant possession and who does not pay *a vacant possession price*, is purchasing an investment. If he is justified in assuming this he may be justified in not consulting the purchaser before reletting. Other factors which a prudent vendor will take into consideration before deciding not to consult the purchaser are, no doubt: (1) the nature of the property, bearing in mind the fact, if it is residential property, that property of this kind appreciates considerably in value when vacant; (2) the conduct of the purchaser: if the purchaser is in default in completing or is unlikely to reply there may be little point in consulting him; (3) the urgency of the matter: the vendor may have found a tenant who demands an immediate decision so that consultation with the purchaser is ruled out; (4) the fact that (in England) a new tenancy to a new tenant of residential property is not controlled under the Rent Act.

Above all, the vendor will not ignore his own interests, the more particularly since, as Lord Cairns said (*t*), his own interests are paramount. If he decides not to consult the purchaser he will not necessarily be liable for failing so to do even where his duty as trustee requires him to consult the purchaser: the purchaser must, in such circumstances, show not only that he would have desired the premises to remain unlet but also that he would have guaranteed the loss of rent involved. The purchaser in *Abdulla* v. *Shah* apparently satisfied this requirement.

Every case of this kind must therefore depend on its own facts but the moral for vendors is, in the light of *Abdulla* v. *Shah*: if in doubt or when opportunity permits notify the purchaser that you intend to relet. Having notified the purchaser the moral, derived from *Egmont* v. *Smith*, is: if he does not reply promptly, go ahead with the reletting.

(*t*) In *Shaw* v. *Foster*, *loc. cit.*, *supra*.

SECTION 56 REVISITED

By J. A. Andrews, B.A., B.C.L. (Oxon.)

The framers of the Law of Property Act, 1925 (*a*), provided in section 56 (1) a section which at face value appears to make a considerable change in our law of contract. They provided that:

"A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument."

To a casual reader this might appear to say that a third party may now sue on a contract, provided only, of course, that it is intended that he shall take some benefit. Despite this, however, the current prevailing view is that the section does no such thing. The popular textbook writers are almost unanimously in favour of a narrow interpretation of this section (*b*). There is one significant exception. Messrs. Cheshire and Fifoot in their fourth edition adopt a very passive approach, but we are led to believe from the preface that for once the writers were unable to reach any agreement.

Judicial opinion seems to agree with the textwriters' opinion that section 56 (1) makes no significant change in our law of contract, and it is interesting to note that it was not pleaded in *Re Schebsman* (*c*), the one case where one would have expected it to be pleaded. Among the judiciary there has been the notable dissentient voice of Denning L.J., as he then was, in *Smith & Snipes Hall Farm* v. *River Douglas Catchment Board* (*d*), and again in *Drive Yourself Hire Co. (London), Ltd.* v. *Strutt* (*e*).

In view of the fact that the vast majority of opinion seems to be contrary to what appears to be the obvious meaning of the section, it is proposed to offer some suggestions as to what the

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(*a*) 15 Geo. 5, c. 20.

(*b*) See, for example, Wilson, 1st ed., 1957, at p. 313, who doubts the intention of the legislature to make any fundamental change in our law of contract. Pollock, 13th ed., 1950, by Winfield, at p. 171, states that it "has not the sweeping effect that might be inferred from its wording." Sutton & Shannon, 5th ed., 1956, by Wedderburn, at p. 369, suggests that it does not abolish the rule of privity of contract. Chitty, 21st ed., 1955, at p. 64, adopts a similarly narrow interpretation.

(*c*) [1944] Ch. 83.

(*d*) [1949] 2 K.B. 500, at p. 517.

(*e*) [1954] 1 Q.B. 250, at p. 274.

section might mean in its strict wording, and what effect the section should have in practice, and finally to relate our findings to what might have been the intention of the legislator. This will be done by considering its implications with regard to deeds and then with regard to contracts not under seal (*f*).

The Effect of Section 56 on Deeds

Deeds are traditionally of two designs, either polled, *i.e.*, cut smooth at the edges, or indented. Furthermore, a deed might be executed by the unilateral act of one party or it might be made between two or more parties. Normally a deed executed unilaterally will be polled and a deed *inter partes* will take the form of an indenture. Where the deed was *inter partes*, each party would have a copy whose indented edges should properly tally with the other party's copy (*g*).

In the case of a deed poll, a person could sue at common law for the benefit of a covenant made in his favour and contained in the deed (*h*), although, of course, he would not be a party to the deed. In the case of an indenture, only the parties to the deed could sue on it. This is commonly referred to as the *inter partes* rule, and it is interesting to observe that an indenture not *inter partes* was for these purposes a deed poll (*i*). The operation of this strict rule, preventing strangers to a deed from suing for the benefit of any covenant in the deed, was therefore in effect restricted to deeds *inter partes* (*k*).

There was a further rule at common law that no grant could be made of an immediate estate or interest in land to anyone not a party to the deed purporting to convey the land (*l*). This rule was abolished by the Real Property Act, 1845 (*m*). Section 5 of this Act provided that:

"Under an indenture . . . an immediate estate or interest, in any tenements or hereditaments, and the benefit of a condition or covenant, respecting any tenements or hereditaments, may be

(*f*) For a complete analysis of the cases which have been decided on section 56, the reader is referred to an article by Mr. D. W. Elliott in (1956) 20 Conv. (N.S.) 43 and 114.

(*g*) The Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 5, enacted that "a deed executed after October 1, 1845, purporting to be an indenture, shall have the effect of an indenture although not actually indented." This section has now been replaced by the L.P.A., 1925, s. 56 (2).

(*h*) Provided there had been delivery of the deed.

(*i*) *Cooker* v. *Child* (1673) 2 Lev. 74.

(*k*) For a recent discussion of this principle and an illustration of its modern application, see *Chelsea and Walham Green Building Society* v. *Armstrong* [1951] Ch. 853. For the old law see Norton, *A Treatise on Deeds*, 2nd ed., 1928, at p. 28.

(*l*) See *Scudamore* v. *Vandenstene* (1579) 2 Co.Inst. 673.

(*m*) 8 & 9 Vict. c. 106.

taken, although the taker thereof be not named a party to the same indenture."

Obviously this section goes farther than merely abrogating the rule that a grant of an immediate estate in land cannot be made to a stranger to an indenture. It is concerned not merely with the validity of the grant but with the ability of the stranger to take an interest or the benefit of a covenant or condition under the deed. In other words, it is giving the stranger a right of action. This is how the Court of Appeal and the House of Lords interpreted it (*n*).

The limitations on this section are quite obvious. It only contemplates tenements and hereditaments. It would therefore seem quite plausible that the drafters of the Law of Property Act intended to enlarge the operation of this clause and to do away with the *inter partes* rule irrespective of whether the deed concerned real or personal property (*o*). After all, the rule was little more than an anachronism. If we allow a person to sue on a deed poll, why prevent him from suing when the solemn promise is in an indenture, which happens to be the product of two parties of which he is not one, and not a unilateral instrument? To achieve this, the old statute needed to be revised. "Immediate estate or interest" becomes "an immediate or other interest." "Any tenements or hereditaments" becomes "land or other property." "The benefit of a condition or covenant" becomes more exhaustively phrased as "the benefit of any condition, right of entry, covenant or agreement." "Indenture" becomes "conveyance or other instrument." "The word 'conveyance' includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will" (*p*). The phrase "or other instrument" is put in to cast the net even wider and include such documents as a deed of exchange and, indeed, all documents under seal. It also envisages written documents not under seal, and this has caused a considerable amount of doubt regarding its effect on our ordinary law of contract.

It has to be recognised that the operation of section 56 (1) is not confined to land. Although it is an integral part of our land law legislation, that legislation contemplates other property. This is clearly shown in section 205 of the Law of Property Act, where property is defined for the purposes of the Law of Property Act as

(*n*) See *Forster* v. *Elvet Colliery Co.* [1908] 1 K.B. 629 (C.A.), affirmed *sub nom. Dyson* v. *Forster* [1909] A.C. 98 (H.L.).

(*o*) It was the intention of the drafters of the statute to assimilate the law of real and personal property.

(*p*) L.P.A., s. 205 (1) (ii).

including " any thing in action, and any interest in real or personal property."

The inter partes rule

The only snag in the suggestion that the intention of the drafters was to exclude the operation of the *inter partes* rule from personal as well as real property is the view of certain authorities who doubt whether the *inter partes* rule ever applied to anything but realty. This view was put forward by Simonds J., as he then was, in *White* v. *Bijou Mansions*:

" It is at least a question how far such a provision [as s. 56 (1)] is necessary at all in the case of personalty. Without deciding it, I should be disposed to think that equitable estates even in land were not subject to the old artificial rule and it is very doubtful if an interest in personalty was ever so subject " (*q*).

With great respect, Simonds J. appears to be confusing two rules. The one is that no grant could be made of an immediate estate or interest in land. This rule, as we have shown, was overruled by section 5 of the Real Property Act, 1845. The other rule is that no one can sue on a covenant in a deed *inter partes* who was not a party to the deed. This latter rule was overruled in part by section 5, but remained the rule for all deeds whose subject-matter was not an immediate estate or interest in a tenement or hereditament, unless the third party could show he was a beneficiary under a trust relationship, until 1926.

To argue that this rule never applied to personalty is contrary to the language used in *Gilbey* v. *Copley* (*r*), *Lowther* v. *Kelly* (*s*) and *Berkeley* v. *Hardy* (*t*), and is contrary to the decisions in *Offly* v. *Warde* (*u*), *Storer* v. *Gordon* (*a*), and *Gardner* v. *Lachlan* (*b*). Finally, the Court of Appeal in *Forster* v. *Elvet Colliery Co., Ltd.* (*c*) discuss the rule in language which is by no

(*q*) [1937] Ch. 610, at p. 625. A similar argument is put forward by Grunfeld in 11 M.L.R. 224, at p. 227: " such sparse authority as there is makes it extremely doubtful whether the ' indenture rule ' ever applied to personalty as well as realty."

(*r*) (1683) 3 Lev. 138.

(*s*) (1723) 8 Mod. 115.

(*t*) (1826) 5 B. & C. 355.

(*u*) (1668) 1 Lev. 235 (release of a debt).

(*a*) (1814) 3 M. & S. 308 (a charterparty). In this case the court went so far as not merely to refuse a third party a right of action on a deed *inter partes*, but refused to allow him to set up the deed as a defence: " A deed *inter partes* cannot act as a release to strangers."

(*b*) (1836) 8 Sim. 123, especially at p. 126, where the Vice-Chancellor refers to the proposition that a third party cannot sue on a deed *inter partes*, as being a settled rule of law. The case itself was concerned with money due on a charterparty.

(*c*) [1908] 1 K.B. 629, affirmed by the House of Lords *sub nom. Dyson* v. *Forster* [1909] A.C. 98.

means confined to realty, and Farwell L.J. quotes *Berkeley* v. *Hardy* as authority for the rule.

Even if there were some doubt as to whether the *inter partes* rule applied to personalty—and in fact there can be no doubt—nevertheless the drafters would be fully entitled to provide against what was a possible restriction on the rights of persons suing on a deed.

If we accept, as in fact we must do, that section 56 (1) is aimed at the *inter partes* rule, does that rule have any application nowadays? In other words, can anyone bring an action on any deed justifying his claim solely on the ground that if the terms of the deed are enforced he will be enriched? The answer is that he has not an automatic right. A few limitations on the operation of the section have been suggested.

Limitations on the operation of the section

The first possible limitation is that the section merely says that he may take an interest or a benefit. It does not say that he shall have a right to an interest or benefit, which the courts must enforce. But this suggested limitation is wholly unrealistic. In terms it is provided that he may take an interest or benefit, provided he is suitably qualified in all respects other than not being a party. If the courts will not give him aid this becomes meaningless verbiage. Suffice it to say that the courts have interpreted this section as conferring a right of action (*d*).

The second suggested limitation is that it does not create new rights but merely protects rights already shown to be existing. This is the interpretation of Wynn-Parry J. in *Re Miller's Agreement, Uniacke* v. *Att.-Gen.* (*e*). This case concerned a deed drawn up between three partners, whereby two of them covenanted to pay certain annuities to the wife and daughters of the third partner as from the death of that third partner. On the death of the third partner death duties were claimed on the annuities. To establish this claim it was necessary to show that the wife and daughter became entitled to a " beneficial interest " on the death of Miller. In this respect the case was on all fours with the celebrated Court of Appeal decision in *Re Schebsman, ex p. Official Receiver, Trustee* v. *Cargo Superintendents (London), Ltd., and Schebsman* (*f*). Wynn-Parry J. rightly concluded on the authority

(*d*) See, for example, *Forster* v. *Elvet Colliery* [1908] 1 K.B. 629; *Re Ecclesiastical Commissioners for England's Conveyance* [1936] Ch. 430; and *Stromdale & Ball, Ltd.* v. *Burden* [1952] Ch. 223.

(*e*) [1947] Ch. 615.

(*f*) [1944] Ch. 83. It is important to remember, however, that *Re Schebsman* concerned itself with a simple contractual agreement, and not a deed under seal.

of this case that the agreement did not operate to grant any rights to the daughters at common law or in equity. But there was one important difference. In *Re Schebsman*, section 56 (1) was not pleaded. It was specifically pleaded in *Re Miller's Agreement*. Wynn-Parry J. noticed that a considerable body of judicial opinion had felt itself constrained to limit the scope of the section and proceeded: "I think it emerges from these cases that the section has not the effect of creating rights, but only of assisting the protection of rights shown to exist" (*g*).

Mr. Elliott has pointed out the unreality of this argument. "If you show a right, which must mean such an interest as would be protected in a court of law or equity, section 56 (1) will allow it to be enforced at your suit. But what kind of right, protected by law or equity, is there which cannot be enforced by its owner? Surely what the section means is that if you show that a right was intended to be enforced by you, then section 56 (1) allows you to enforce it, although by the rules of common law or equity you could not have enforced it, in other words, although by those rules you should have no right" (*h*).

The present author is in agreement with the above criticism and it only remains to be added that there is a number of cases which have specifically recognised that section 56 (1) of the Law of Property Act and section 5 of the Real Property Act have created new rights (*i*). It therefore would appear that this is no proper limitation on the operation of section 56 (1).

There is, however, one limitation at least on the operation of the section. The rights which may accrue to the stranger are stated very widely: "an immediate or other interest . . . or the benefit of any condition, right of entry, covenant or agreement." But these rights must be with reference to "land or other property" and although "property" is very widely defined in section 205 as including "any thing in action and any interest in real or personal property," it is perhaps not exhaustive of all things in which interests might be created by deed. Suppose, for example, by a deed made *inter partes* A and B, A promises certain personal services to C. Can C sue on this deed, claiming the benefit of section 56 (1)? His action might well fail on the ground that personal services are not of the same nature as that which is contemplated by the phrase "or other property." A further point of doubt is whether the phrase "over or respecting" necessarily

(*g*) [1947] Ch. 615, at p. 622.
(*h*) (1956) 20 Conv.(N.S.) 114, at 123.
(*i*) See, for example, *Re Ecclesiastical Commissioners for England's Conveyance* [1936] Ch. 430 and *Stromdale & Ball, Ltd.* v. *Burden* [1952] Ch. 223.

implies that the section will only operate on property already in existence. It would seem sufficient if the property (including a chose in action) is specifically contemplated by the parties at the time of the contract. Suffice to note, at any rate, that the question has never been pleaded, though it might well have been raised in *Re Miller's Agreement.*

Farwell L.J., in *Forster* v. *Elvet Colliery* (*k*), was of the opinion that the use of the phrase "respecting any tenement or hereditament" in section 5 of the Real Property Act, confined its operation to those conditions or covenants which were not simply collateral but which affected the nature and quality of the land and ran with it. On appeal, Lord Macnaghten specifically doubted this point (*l*), though he had no reason to decide it, since he found that the covenants in that particular case were capable of running with the land. Since the other lords concurred in his judgment and since, further, section 56 (1) extends its operation to "agreement over or respecting . . . other property" and personal property knows of no such distinction between covenants merely collateral and those running with the property, it can be expected that the operation of this section is not excluded from covenants which are simply collateral and do not affect the nature and quality of the property. Nevertheless, the Court of Appeal in *Grant* v. *Edmondson* (*m*) preferred to hold themselves bound by what they called the decision in *Forster* v. *Elvet Colliery* at Court of Appeal level and not to heed the dicta of the House of Lords. As Danckwerts J. has recently said: "I do not understand why the words 'agreement respecting land' should not be given their plain meaning" (*n*). He himself refused to consider whether the particular covenant ran with the land, holding as he did that there was no such restriction on the operation of section 56 (1) (*o*).

Undertaking must be direct to third party

The last possible limitation on section 56 (1) is the most important and very little help can be obtained from the wording of the section.

In a deed between A and B it may appear that C shall take a benefit either because one of the parties has in terms promised him a benefit, or because one of the parties has promised the other

(*k*) [1908] 1 K.B. 629, at p. 640.
(*l*) [1909] A.C. 98, at p. 102.
(*m*) [1931] 1 Ch. 1, see especially pp. 27 and 28.
(*n*) *Stromdale & Ball, Ltd.* v. *Burden* [1952] Ch. 223, at p. 235.
(*o*) The judgment of Luxmoore J. in *Re Ecclesiastical Commissioners of England's Conveyance* [1936] Ch. 430, at p. 438, lends support to the view of Danckwerts J.

party in such a way that if his promise is properly performed C will benefit. We can illustrate this. Suppose two partners, A and B, draw up a deed to dissolve their partnership and it is agreed between them that A shall pay an annuity to B's daughter, C. It may be that A will promise B that he will pay C her annuity or it may be that A will, in substance, promise C that he will pay her an annuity. In the first case, it cannot be in the contemplation of the parties that they are giving C a right of action. The promise is by A to B, and doubtless they will be under the impression that at any time they can change their minds and substitute D for C in a fresh deed. In the second example, however, the covenant is expressly between A and C, although the parties to the deed are A and B. It is submitted that this is the type of case which is contemplated by section 56 (1) and in the first illustration C cannot seek the benefit under section 56 (1).

Unfortunately, in the majority of the cases, it will not be clear from the express terms of the deed to whom the promise is made. In fact it may appear that the promise is made to one of the parties and to the stranger to the deed. It is suggested that Simonds J., as he then was, correctly stated the law when he said: "... only that person can call it [s. 56 (1)] in aid who, although not named as a party to the conveyance or other instrument, is yet a person to whom that conveyance or other instrument purports to grant something, or with whom some agreement or covenant is purported to be made" (*p*). His judgment was upheld by the Court of Appeal, where Lord Greene M.R. used words of a much vaguer character, but which have generally been interpreted as supporting the dictum of Simonds J. (*q*).

In the first illustration above, neither party purports to make any agreement with C. Neither do they purport to grant her anything. B is the promisee and C is a person who may come out lucky if the others decide to stick by their agreement, but she will not take under the deed, since the parties to the deed do not purport to grant her anything. In the second case, however, the promise is made by A to C on the face of the deed. A purports to grant C something and C is within the scope of the words used by Simonds J.

While it is easy to illustrate the distinction, in practice it leads to considerable difficulties for the court in having to construe the vague words used in the deed. Nevertheless, the proper test is to

(*p*) *White* v. *Bijou Mansions* [1937] Ch. 610, at 625. Bennett J. in *Zetland* v. *Driver* [1937] Ch. 651, at p. 657, adopted this dictum of Simonds J.

(*q*) *White* v. *Bijou Mansions* [1938] Ch. 351, *per* Greene M.R. at p. 365: "It is, I think, confined to cases where the person seeking to take advantage of it is a person within the benefit of the covenant in question."

ascertain whether one of the parties to the deed has purported to make a grant to a stranger.

This precise difficulty arose in *Stromdale & Ball, Ltd.* v. *Burden* (*r*). Here, by a deed *inter partes*, the landlord gave a licence to two tenants to assign their term to a company. The licence contained an option in favour of the assignees that if they should be desirous of purchasing the landlord's interest subject to certain conditions, " the landlord hereby covenants that she will assign all her interest in the residue unto the company." Danckwerts J. was left to construe the deed and to decide whether the plaintiffs were able to seek in aid section 56 (1). In a very clear judgment he discussed at some length the words used by Simonds J. in *White* v. *Bijou Mansions*, and specifically associated himself with them. He found that on a proper construction " the plaintiff company is a person to whom the instrument purports to grant something or with which some agreement is purported to be made " (*s*).

Drive Yourself Hire Co. (London), Ltd. v. *Strutt* (*t*) is a case in point, despite the fact that it was eventually disposed of on the question of the unlawfulness of an assignment to which section 56 (1) was not relevant. During the course of proceedings counsel argued that the application of section 56 (1) must be limited to persons " with whom some agreement or covenant is purported to be made." His argument was that it must be formally expressed to be " with " the stranger. Somervell L.J. interjected that this might well be a too narrow interpretation of the section (*u*). Denning L.J. argued that " enforceability does not depend on the form of the obligation but on the substance of it. A covenant is, for this purpose, sufficiently made ' with ' a person if it is, on the face of it, made directly for his benefit in such circumstances that it is intended to be enforceable by him " (*a*). As authority for his view he quoted *Stromdale & Ball* v. *Burden*.

His remarks are quite unimpeachable if they are taken to mean that where there is some ambiguity on the face of the deed we are entitled to look at the substance of the obligations to see if the parties really intended the third person to be treated as a

(*r*) [1952] Ch. 223.
(*s*) *Ibid.*, at p. 234.
(*t*) [1954] 1 Q.B. 250.
(*u*) *Ibid.*, at p. 264.
(*a*) *Ibid.*, at p. 272. An obvious illustration of this would be a covenant in an assignment of a sublease to insure against fire, reserving the right to claim damages for breach of covenant to the head landlord. Although the landlord is not a party to the deed of assignment he is obviously a person who can sue under section 56 (1) though on the face of the deed the covenant may not purport to be made " with " him.

grantee (*b*). So read, his words will stand with the judgment of Wynn-Parry J. in *Re Miller's Agreement*, the facts of which are set out above. Wynn-Parry J. found that the provision of annuities in the deed was an "entirely colourless circumstance," and went on to say that he could not find that the deed conferred on the wife and daughter any right to sue, or anything more than a right to retain any sums which might be paid (*c*).

There is one further gloss on this test and that is that the document must purport to confer an absolute right to the property on the stranger. In the cases of *Re Sinclair's Life Policy* (*d*) and *Re Foster* (*e*) the court put a strange construction on the documents, which in both cases created life policies, and held the persons named to receive the money payable under these policies were by construction mere nominees. It was not intended to confer on them any beneficial interests. Since it was not intended to grant them any beneficial interest in the policy money, the court would not allow them to call in aid section 56 (1).

The Effect of section 56 (1) on Contracts not under Seal

The drawing up of a deed is attended by an amount of formality. It has a traditional solemnity which is not found in our ordinary everyday contracts and a person who makes a promise under seal fully expects it to be binding on him. The fundamental principle of our law regarding deeds is that promises under seal are binding. The *inter partes* rule is therefore an exception to the fundamental principle, an exception which has almost wholly disappeared since 1925.

The position in the ordinary law of contract is very different. Here the fundamental principle is not the enforcement of promises but the enforcement of bargains. This is the result of the rule that no person can enforce a promise unless he has given consideration for it. There is a second principle, that a person can acquire neither rights nor duties under a contract to which he is not a party. This latter principle we commonly refer to as the rule requiring privity of contract. In truth, this is not a fundamental principle of our common law. As a rule it has no great history. In fact it is a modern and largely academic rationale for a group of cases

(*b*) Under the old common law parties to a deed *inter partes* were determined exclusively by the form of the instrument, but it is suggested that there is a lot to be said for refusing to apply any formal test to the new legislation.
(*c*) [1947] Ch. 615, at pp. 622 and 623.
(*d*) [1938] Ch. 799.
(*e*) (1938) 159 L.T. 279.

running from *Bourne* v. *Mason* (*f*) to *Tweddle* v. *Atkinson* (*g*) that were decided wholly on the principle that consideration must move from the promisee.

Be this as it may, the doctrine of privity of contract is nowadays well established in the minds (and the books) of lawyers. Its validity as a rule of law was questioned by Denning L.J., as he then was, in *Drive Yourself Hire Co. (London) Ltd.* v. *Strutt* (*h*), who went so far as to say: "For the 200 years before 1861 it was settled law that, if a promise in a simple contract was made expressly for the benefit of a third person in such circumstances that it was intended to be enforceable by him, then the common law would enforce the promise at his instance, although he was not a party to the contract" (*i*). His statements were, of course, entirely *obiter* and their value is slight when one realises that he makes no mention of such cases as *Bourne* v. *Mason* (*k*) and *Price* v. *Easton* (*l*). In any case since 1915 there has been House of Lords authority for the common law rule (*m*).

It would, however, appear even from the strictest literal reading of section 56 (1) that its wording covers not only the *inter partes* rule with regard to documents under seal but also the common law rule of privity of contract. In *Smith & Snipes Hall Farm, Ltd.* v. *River Douglas Catchment Board*, Denning L.J. anticipated his attack on the doctrine of privity of contract in *Strutt's* case. In support of his argument he referred to section 56 of the Law of Property Act. While agreeing that the section was "confined to cases where the person seeking to take advantage of it is a person 'within the benefit' of the covenant or agreement," he stated his opinion that it was wide enough to allow a person to enforce an agreement respecting property although he was not a party to the contract (*n*). Later in *Strutt's* case his Lordship went on to say:

"Just as the 1845 Act modified the old technical rule about indentures, so the 1925 Act modified the new technical rule about contracts generally. Section 56 applies, not merely to indentures, but to any instrument of agreement: and it applies not only to land, but to any property . . . I can think of no words more apt to do away with the rule in *Tweddle* v. *Atkinson* leaving the courts free, in cases respecting property, to go back to the old common law,

(*f*) (1668) 1 Ventris 6.
(*g*) (1861) 1 B. & S. 393.
(*h*) [1954] 1 Q.B. 250.
(*i*) *Ibid.*, at p. 272.
(*k*) *Supra*, n. (*f*).
(*l*) (1833) 4 B. & Ad. 433.
(*m*) *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co., Ltd.* [1915] A.C. 847.
(*n*) [1949] 2 K.B. 500, at p. 517.

whereby a third party can sue on a contract made expressly for his benefit; and rid also of the old rule about deeds *inter partes*" (*o*).

Of course, even if section 56 (1) does strike a blow at the privity doctrine it does not destroy it completely since its operation is confined to rights concerning "land or other property." Furthermore, the contract must be contained in a "conveyance or other instrument." The word "instrument" does not have any peculiar technical meaning other than the fact that it must be in writing. It commonly imports a document of a formal nature, but, strictly speaking, it includes any matter which is in writing. The Law Revision Committee in 1937 doubted "whether the words 'conveyance or other instrument' would cover a commercial contract, *e.g.*, a banker's letter of credit or a contract in writing for the sale of goods" (*p*). They gave no reasons for their doubt which seems to have been based on nothing more than suspicion that section 56 (1) could not have caused such change in our law of contract as is contemplated by the wider interpretation of this section.

The wording of section 56 (1) certainly seems to support Lord Denning's conclusions. Despite this fact, members of the bench have felt themselves constrained to give it a narrow interpretation. So Farwell J. in *Re Sinclair's Life Policy* stated: "It is quite obvious that that section, if it were read quite literally, would have an overreaching effect which was never the intention and could not have been the intention of the legislature . . . a reasonable construction must be put on this section" (*q*). One shudders to think what rules of statutory interpretation Farwell J. applied. Without wishing to seem pedantic it is suggested that where a statute has an obvious literal meaning the most reasonable thing a judge can do is to give it that meaning. Later in the same judgment he made another statement to the effect that: "this section cannot in my judgment give [a person] a beneficial title . . . if apart from the section he has no title." His words anticipate those used by Wynn-Parry J. in *Re Miller's Agreement*. In plain they are saying that the section creates no rights, and in fact does precisely nothing, which must be rather disappointing for the framers of the statute. It has already been shown that there is superior authority to the contrary (*r*).

Crossman J. dealt equally severely with an attempt to invoke section 56 (1) in *Re Foster, Hudson* v. *Foster* (*s*).

(*o*) [1954] 1 Q.B. 250, at p. 274.
(*p*) Law Revision Committee, Sixth Interim Report (1937), para. 41 (e).
(*q*) [1938] Ch. 799, at p. 804.
(*r*) See n. (i), *supra*, p. 184.
(*s*) (1938) 159 L.T. 279.

"Mr. Stone contended that the effect of section 56 is that any beneficiary under a contract can sue on the contract although he is not a party to it. . . . In my judgment, section 56 does not have this effect. I think Mr. Stone's contention really amounts to this, that an agreement by A with B to pay money to C gives C a right to sue on the contract . . . and I am not prepared to hold that section 56 has created such an enormous change in law of contract as would be involved in that proposition."

Then Crossman J. goes on to say: "section 56 can only be called in aid by a person who, though not a party to the conveyance or other instrument in question, is yet a person to whom that conveyance purports to grant something or with whom agreement or covenant is thereby purported to be made" (*t*).

No one can find fault with the last proposition. The point on which both these cases turned, as has been pointed out above (*u*), was one of construction. Both judges decided that the representatives named on the face of the life policies were not the persons to whom the life policies purported to grant the legal right to claim the policy moneys but merely nominees. Such a construction may seem a peculiar one but once it is made there is no room for the operation of section 56 (1).

It is to be hoped that at some time in the near future the real scope of the operation of section 56 (1) will be decided. Neither Crossman J. nor Farwell J. was prepared to reject outright its operation on our ordinary contract law and insofar as the wording of the section goes it seems to be quite conclusive evidence for including written contracts not under seal within its scope. "A person may take . . . the benefit of any . . . agreement . . . respecting land or other property, although he may not be named as a party to the . . . instrument." In other words it will no longer matter that a person is not named as a party to the instrument. He shall be treated as if he were a party to the contract insofar as he is claiming any benefit under the instrument, subject only to those limitations on the operation of section 56 (1) which we have already noticed when dealing with its effect on deeds.

But the section does not go any further than this. It does not say: a person who is not a party to the instrument shall nevertheless have a right of action for any benefit the instrument purports to give him. If it said this it would put him in a better position than a party to the contract, who might be prevented from suing by the fact that the other party is a minor or by the fact that he himself has given no consideration. All the section does in fact is

(*t*) *Ibid.*, at p. 282.
(*u*) *Supra*, p. 188.

to equate the stranger with a party to the contract. It says "he may take an interest . . . although he may not be named as a party," or in other words the mere fact that he is not a party to the instrument will not in itself prevent a person from taking an interest—provided that in all other respects he is suitably qualified.

Consideration must move from third party

The mere fact that we treat him as a party to the contract will, of course, help him not at all. Party or not, he must as a promisee show that consideration has moved from him before he can succeed in his action, and in the majority of cases he will have given no consideration for the defendant's promise. The fact that he has altered his position in reliance on the other's promise will not avail him unless it was done as the price of that other's promise. In other words the promise must have been given in contemplation of some act or forbearance on the part of the stranger-promisee.

Suppose the following situation: In a written contract in return for A's promise to sell him his car B promises A £70 and he also promises C £30, at the request of A.

If A wants his £70 he must be prepared to transfer his car. If he is unwilling to do this he will not get his £70. Now suppose A sells and conveys his car to X so that he is now unable to fulfil his side of the bargain and C brings an action for his promised £30. He will be met by the same reply as A that the contract has now fallen through since A is unable to meet his obligations. The court is hardly likely to give C an action on the contract and so put him in a better position than A. To do so would open the way to all sorts of sharp practices. But on a correct interpretation of the situation C's rights should depend on the instrument and not on its performance. The transfer of the car is, so far as C is concerned, quite independent of the contractual agreement reached in the instrument, nor on the wording of the instrument is it a condition precedent to the operation of B's promise to C. The whole point is that in neither of these situations can C show any good reason for the court's enforcing B's promise at his request.

Nowadays we view consideration purely as an element essential to the formation of a valid contract. The essential significance of consideration is not merely as a *sine qua non* of a contract but as that which distinguishes a gratuitous promise from one which has been bought. In the vast majority of cases it makes no difference whether we view the giving of consideration as the ground for giving a right of action on a promise or as an element in a contract because the parties to the promise will be the parties to the contract, which

will exist where consideration has been given. But it does become important when the promisee is not also a party to the contract *ab initio* but becomes a party to the contract by operation of section 56 (1). He will be able to show the existence of a contract, to which he is a party, and for which consideration has been given. But that consideration has not been given by him and will not support the promise to him.

Traditionally all that is necessary for an action of assumpsit is that one person shall have promised another, but early in the history of this action the courts decided that there must exist a particular justification for the enforcing of this promise (*a*). The particular justifying factor they termed consideration. The fact that it is not merely a *sine qua non* for the creation of a contract but a vital necessity for anyone wishing to enforce a promise is shown quite clearly by the cases. *Bourne* v. *Mason* (*b*), *Crow* v. *Rogers* (*c*), *Price* v. *Easton* (*d*) and *Thomas* v. *Thomas* (*e*) emphasise the rule that consideration must move from the promisee. So also *Tweddle* v. *Atkinson* (*f*) was decided on this point. The modern view is to consider this as merely incidental to the "wider" doctrine of privity of contract. In fact the phrase privity of contract rarely appears in the law reports until some time after *Tweddle* v. *Atkinson*. It was never mentioned in the judgments in that case the reasoning of which is based wholly on the rule that a stranger to the consideration cannot take advantage of a promise. Even *Sprat* v. *Agar* (*g*) and *Dutton* v. *Poole* (*h*), cases which seem to support the view that a third party might have an action at common law, were in accordance with this view. They were decided at a time when the idea persisted that moral obligation was sufficient consideration.

Finally support for this view is to be found in the House of Lords decision in *Dunlop* v. *Selfridge* (*i*). The existence of the rule that consideration must move from the promisee was recognised as being the bar to a non-party wishing to sue on the contract. The judgments of Viscount Haldane L.C. and Lords Dunedin, Atkinson and Parker of Waddington emphasise that the main reason for refusing Dunlop's petition was that they had given no consideration for the

(*a*) See *Joscelin* v. *Shelton* (1557) 3 Leon. 4 and *Bourne* v. *Mason* (1668) 1 Ventris 6.
(*b*) *Supra*, n. (*a*).
(*c*) (1724) 1 Strange 592.
(*d*) (1833) 4 B. & Ad. 433.
(*e*) (1842) 2 Q.B. 851.
(*f*) (1861) 1 B. & S. 393.
(*g*) (1658) K.B. cited in *Bourne* v. *Mason*.
(*h*) (1678) 2 Lev. 210.
(*i*) [1915] A.C. 847.

defendant's promise and therefore could have no contractual rights. The doctrine of privity of contract is referred to by Lord Haldane but the other law lords barely allude to it.

Although therefore section 56 (1) appears to drive a coach and horses through the doctrine of privity of contract it makes no change in the rights of the third party who has given no consideration unless the contract is contained in a deed, for then consideration will be unnecessary.

It may be, however, that the third party has given consideration, in which case he may well have an action, but we may question whether even here a right of action arises under section 56 (1) which would not have arisen before the Law of Property Act. It should be borne in mind the conclusions which we reached above, that in fact section 56 (1) only operates where the third party is, either expressly or impliedly as a result of the words used or substance of the obligations undertaken by one party to the document, a promisee. If he is merely trying to enforce promises made by one party to the contract to the other party, which might take effect to his advantage, section 56 (1) will not help him.

Let us suppose A has agreed to sell his car to B, and B in return for A's promise promises to pay £70 to A and £30 to C, who is not a party, provided C overhauls the vehicle. If C refuses to overhaul the car he will have no claim to his £30. If he does overhaul the car, it is submitted he can maintain an action for his money, invoking section 56 (1) in his favour. But is this really creating a new right as a result of the provisions of this section? Under the old law the construction would surely be that B has made a direct promise (or offer) to C, who has given consideration (and by so giving consideration has accepted B's offer). In other words C's rights are merely underlined by section 56 (1) (*k*).

It can virtually be said that English law could throw overboard the use of the doctrine of privity of contract without affecting the rights and duties created under contracts. It is in fact suggested that section 56 (1) really does drive a coach and horses through the doctrine but does not affect the substance of the rights and duties of parties and non-parties to a contract not under seal. Let us take for example the situation where A, B and C are all parties to a contract. A promises B and C severally £100 if B will do a certain piece of work for him. A declines to pay the £100 and C

(*k*) See *Corny and Curtis* v. *Collidon* (1674) 1 Freeman K.B. 284. In this case a stranger to the contract who had given good consideration was held to be entitled to sue. "When a promise is made to a stranger on good consideration, he that has an interest in the promise shall sue."

cannot compel him to do so (*l*). Here C is a third party to the consideration but not to the contract. Precisely the same effect is achieved though C is not a party to the contract. In other words party or not a party to the contract is of no legal significance. The real legal test is whether the promisee has given consideration.

If he is a third party and one of the contracting parties has made a promise in his favour in terms which contemplate some act or forbearance on his part as the price of the promise then if he has carried out his act or forbearance he will have an action on that promise however estranged he might have been from the original contract. This is simply because he has been promised and has given consideration for that promise. That is the whole essence of assumpsit.

Conclusions

It is suggested that section 56 (1) operates to give a stranger to a deed *inter partes* a right of action for all those interests of which the deed by its wording or substance purports to treat him as a grantee of the legal right; provided only that the claim is made to a right which has reference to "land or other property." With regard to contracts not under seal contained in some "instrument" (*i.e.*, contracts in writing) and having reference to land or other property, then the third party shall be treated as if he were a party to the contract for the purpose of taking those rights of which he is the grantee under the contract. Since it is believed that English law owes nothing to the doctrine of privity of contract the effect of section 56 (1) on our law of simple contracts is nil.

It is, of course, well recognised that there are cases where the doctrine of privity of contract might work extreme hardship. We may take the case of a partnership agreement when one of the partners wishes to withdraw from the partnership and, say, provide for his wife and daughters. He may sacrifice his share of the partnership in return for annuities to be paid to himself and, after his death, to his wife and daughters. He may die content that he has provided for his wife and daughters, but they will live on in an anxiety whether the other partners will pay them their annuities or whether they can rely on the personal representatives to enforce the contract.

The other partners can sit tight until the personal representatives bring an action. If no action is brought they are the gainers. But this is not exceptional. It always happens when one party to a

(*l*) The reader will recognise this case as being selected from the Law Revision Committee's Sixth Interim Report, para. 37.

contract has executed his promise and then does not enforce the promise to him. However equitable the claim of the dependants is, the law of contract has never helped them and does not help them now.

Whilst the refusal of the Court of Appeal in *Re Schebsman* (*m*) to give an extended application to the trust concept can be justified, there was undoubtedly a chain of authority which supported the application of the trust concept to enable a third party to enforce his rights and it was open for the Court of Appeal to add their support to this doctrine. One can only regret that they did not see fit to do so, for it would solve the problem of those cases where the intention of the parties has been to give a third party a right of action and the situation is one in which the conscience of one (or both) of the parties is affected. Of course, if the parties themselves appreciate the situation or take legal advice, then they should specifically show that their intention is to create a trust and avoid all difficulties of the court's having to read a trust into a situation where there is no evidence of the parties' intention.

It might be further argued that any distinction between the rights of third parties arising under a conveyance under seal and those arising under a conveyance under hand is illogical. There are, of course, many differences in the operation of these conveyances, but are we justified in distinguishing the effect of section 56 (1), according to whether the document is a simple written contract or is under seal when section 56 (1) purports to operate equally on all " conveyances or other instruments " ?

The answer to this is that section 56 (1) does operate in precisely the same way on all instruments. It does away with the distinction between a promisee who is also a party and one who is not a party. The fact that the ultimate rights of the promisee depend upon whether the instrument is under seal or whether a promisee has given consideration is not without precedent in English law.

In *Re Ecclesiastical Commissioners for England's Conveyance* the covenant in favour of the earlier assigns of one of the parties " owners for the time being of lands adjoining " was contained in a conveyance under seal. The application of section 56 (1) in accordance with the above principles enabled the previous assigns to claim the benefit of the covenant. If the conveyance had been a conveyance of an equitable estate under hand, not under seal, then the previous assigns could not have claimed the benefit of the covenant made in their favour. The court would, of course, be faced with the strong argument that a conveyance of an equitable

(*m*) [1944] Ch. 83.

estate under hand should be favoured by an application of section 56 (1) in the same way as a conveyance under seal. But it is submitted that the question the court should ask itself is whether, irrespective of any application of section 56 (1), the intended beneficiary would take " an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property " if he was a party to the conveyance or other instrument; but was a party who could show no consideration moving from himself. If he does not then it is difficult to see how the words " although he may not be named as a party to the conveyance or other instrument " can help him.

In this article no distinction has been drawn between conveyances of real or personal property. This is because it is believed that the application of section 56 (1) is the same irrespective of the nature of the subject-matter of the instrument, provided only that it is " land or other property " within the meaning of the Law of Property Act. It is submitted that the intention of the framers of the section was to restrict considerably the application of the *inter partes* rule and the doctrine of privity of contract to instruments concerning the transfer of " land or other property." It has frequently been suggested that they could never have had in mind the wholesale revision of our law of contract which would be involved by the abolition of the doctrine of privity of contract, but it hardly seems credible that they did not contemplate that their language was sufficiently wide to include ordinary written contracts within the operation of the section. One can, therefore, conclude that they must have been aware that they were driving a coach and horses through the privity doctrine but thought this to be of little consequence. This can only be so if they realised that the cases are not based on any formal considerations such as whether a person is a party or not but on the more substantive test of whether or not he has given consideration. In 1925 they would be more likely to think on these lines than in 1959 when students of law are told that *Tweddle* v. *Atkinson*, *Crow* v. *Rogers*, etc., were decided on the privity doctrine to which the rule that consideration must move from the promisee is merely " a contributory factor " (*n*).

(*n*) For an illustration of the now popular textbook approach see Cheshire & Fifoot, 4th ed., pp. 364 and 365. This presents an interesting comparison with, say, Chitty on *Contracts*, 8th ed., 1904, where the discussion of the cases we now place in a chapter on privity of contract comes at the end of the section on consideration under the sub-heading " Of the plaintiff being a stranger to the consideration." This form is rightly maintained by the present editors of Chitty, 21st ed., pp. 62 *et seq*.

LAW OF TRUSTS AND PROPERTY IN THE BAHAMAS

By George C. Mason, Barrister-at-Law

Apart from a land tax of two and sixpence in the pound on real property situate in the Colony (*a*) there is no direct taxation (government or municipal) in the Bahama Islands and, for this reason, the Colony has become a tax-planning centre of considerable significance. In order to take advantage of the position it is commonly necessary to create a Bahamas settlement, or to purchase immovable property in the area, or to include such property in a settlement created in the Bahamas or elsewhere.

It is therefore considered that some observations on the law of property and settlements generally in the Colony may be of assistance to those contemplating tax avoidance transactions involving Bahamas trusts and interests, for, while it is the almost invariable practice to employ an attorney there to draw or approve settlements (and the invariable and prudent practice in the case of property transactions), the attorney is concerned only with the validity of a particular document from the point of view of Bahamas law, and not with advising on limitations or arrangements which have United Kingdom tax advantages. Information concerning the limitations and arrangements that are prohibited or restricted by Bahamas law is, therefore, necessary in the formative stage of the tax-planning scheme. It is also necessary to formulate instructions to the Bahamas attorney to prepare documents or to draw them for submission to him.

Nature of Bahamas Law

It is important to note that the radical legislation of 1925, such as the Law of Property Act, the Settled Land Act and the Trustee Act of that year, do not apply in the Bahamas. It is sometimes not appreciated that this legislation is not generally applicable in the Colonies or in any other places, such as Eire, in which the law is based on the English system. The law of property in the Colony corresponds to that of England before 1926, that is, it is based on the common law as varied and extended by equitable principles and (usually at a later stage) by statute. Some of the statutes

(*a*) This tax was imposed by the Real Property Tax Act of the Colony of 1951 and is payable in respect of all rental assessments exceeding £30.

applying in the Bahamas are those of the Imperial Parliament applying directly, some are Acts of the Imperial Parliament applying by virtue of Acts of the Bahamas Legislature, and some are enactments of that Legislature which may, or may not, have corresponding United Kingdom provisions.

It would not, of course, be within the scope of this article to seek to deal, even in an outline way, with the vast amount of law and custom which goes to make up the pre-1926 law of property, trusts, and conveyancing, as now applicable in the Bahamas, and in so many other places. Fortunately, such treatment can be avoided, from a practical point of view, for one of the difficulties and frustrations of the old law is that so much is contained in it that had become obsolescent in practice. For example, while certainly the most intricate and confusing aspects of that law concerned future legal interests by way of contingent remainders and executory interests, and the narrow distinctions between them, in fact such interests were rarely limited, substantially the same results being achieved, in more modern times, by the employment of equitable interests (*b*) which avoided all the difficulties. Something of the same sort is happening here, of course, by the gradual displacement of the strict settlement by the trust for sale.

Statutory Provisions in the Colony

It is, however, necessary to examine in some detail the statutory provisions affecting the Colony for, as in the United Kingdom before 1926, apart from the rule against perpetuities, and the rule against double possibilities (*c*) and equitable practice generally, it is the statutes which extend or restrict any particular mode of limitation or settlement. It is important to note that the Statute of Uses applies in the Colony. De Donis Conditionalibus and the Military Tenures Act, 1660, also applied but do not now do so (*d*). Of the more modern statutes, the Law of Property Amendment Act, 1845, which was extended to the Bahamas in 1846, may first be mentioned. It will be in mind that the Act of 1845 had far-reaching effects on conveyancing in England, and so has today in the Colony. Freeholds, therefore, lie in grant as well as in livery, all grants must be by deed, the tortious operation of feoffments was abolished, strangers to a deed may take benefit and contingent

(*b*) This is all the more true of the Bahamas to which the Settled Land Acts never applied.

(*c*) Not applicable in England after 1925.

(*d*) See *infra*.

remainders are protected from failure through the artificial determination of the precedent estate of freehold.

The next legislation of significance is Lord St. Leonard's Acts, 1859 and 1860 (*e*), which were extended to the Colony by Act of the Legislature of 1860. The result is that waiver only applies to a breach actually waived so that the right of re-entry under a lease is not destroyed; the same right also attaches to each part of a severed reversion instead of being destroyed; and descent is to be traced in the case of realty on total failure of the heirs of the purchaser, or of the ancestor, from the person last entitled as if he was purchaser. The Real Property Limitation Acts, 1833 (*f*) and 1874, have been extended to the Colony in 1846 and 1877 and the Prescription Act, 1832, was extended in 1846. The period within which an action for the recovery of land must be brought is twenty, and not twelve, years under the Limitation Acts (*g*) and, under the Prescription Act rights of way, support and water are indefeasible after forty years and rights to light are acquired after twenty years.

The Partition Acts, 1868–76, do not specifically apply in the Colony but an Act of the Legislature of 1890 substantially enacts their terms so that the court has power to order a sale in lieu of partition in the case of land held in joint tenancy, tenancy in common, and coparcenary, and must do so on the application of a person interested to the extent of at least a moiety.

The Real Estate Charges Acts (Locke King's Acts), 1854, 1867 and 1877, have not been extended to the Colony but the same effect is achieved by the Real Estate Charges Act, 1933, of the Bahamas Legislature so that a mortgage debt is payable out of devised lands and not out of the personalty as it otherwise would be. Again, the Married Women's Property Acts, 1882 to 1894, have not been extended to the Colony but their place is taken by the Married Women's Property Act, 1884, of the Colony (as amended by the Married Women's Property Act, 1895).

The Fines and Recoveries Act, 1833, does not apply but the Estates Tail Barring Act, 1862, of the Bahamas Legislature provides that every tenant in tail "whether in possession, remainder, contingency, or otherwise, shall have the same and the like power to dispose for an estate of a fee simple absolute, or for any less estate, the lands entailed, as any tenant in tail can, in England, under the provisions of the Act of the Imperial Parliament third and fourth William the Fourth Chapter seventy four, now dispose

(*e*) The provisions concerning insurance in ss. 4 to 9 of the Act of 1859 do not apply.

(*f*) The ecclesiastical provisions were deleted.

(*g*) This is because s. 9 of the Act of 1874 does not apply.

of lands of which he is tenant in tail as aforesaid." The word "dispose" in the Fines and Recoveries Act also comprehends cases where there is no transfer of the land on sale or otherwise but where it is conveyed to a feoffee to the use of the grantor and his heirs discharged of all estates in tail of the grantor in law or equity, the statute executing the use to the grantor. It would therefore seem that fees tail can be barred in the Colony both on a sale and where there is no legal or equitable transfer.

Up to the enactment of the Land Transfer Act, 1897, realty in England vested immediately on a death in the heir or devisee. This Act has not been extended to the Bahamas but, as a result of the local Real Estate Devolution Act, 1914, real estate vests in the personal representatives. This Act corresponds to Part I of the Land Transfer Act with the exception of the fact that it contains no reference to liability to duty and does contain a reference to the personal representative wife's not having a right to dower. The descent of real property upon intestacy is governed by those complicated rules which applied in England before 1926 and are similarly modified by the Colony's equivalent of Lord St. Leonard's Acts and by the Inheritance Act, 1833, which extends to the Colony.

Neither the Vendor and Purchaser Act, 1874, nor the Conveyancing Acts, 1881 and 1882, apply in the Colony but the Bahamas Conveyancing and Law of Property Act of 1909 incorporates the provisions of both of those Acts. Part VII of the Act of 1881 is not reproduced in the Bahamas Act. This Part related to trustees and executors and was repealed by the Trustee Act, 1893, and thereby re-enacted with slight alterations. The Trustee Act, 1893, applies in the Colony. There are, therefore, in the Colony provisions for a vendor and purchaser summons and for length of title (forty years), for the discharge of incumbrances on sale, the effects of general words of conveyance, covenants for title by beneficial owners, reliefs against forfeiture of leases, powers and liabilities of mortgagors and mortgagees, and all the other far-reaching provisions of the Vendor and Purchaser and Conveyancing Acts, together with the provisions of the Trustee Act relating to authorised investments, power to insure, loans by trustees, and vesting in new and continuing trustees.

Non-Application of Statutes

The Common Law Procedure Act does not apply in the Colony and there is no corresponding enactment. It is not, therefore, open to a tenant in proceedings for forfeiture for non-payment of rent or mortgage debt to stop the proceedings on payment of what

is due with interest and costs or to resume possession if he pays his rent within six months. A distinct problem exists concerning powers of appointment. At one time it was considered in England that, in the case of a power to appoint amongst a certain class, unless the authority was exclusive, that is, to appoint to all or any of that class, the donee had to appoint a substantial share to each member or the appointment would be bad as illusory. The Illusory Appointments Act, 1830, required merely a small share to be appointed and the Illusory Appointments Act, 1874, made all powers exclusive. Neither of these Acts apply in the Colony so that it is necessary to ensure that every power is drawn as an exclusive power.

Neither Thellusson's Act nor the Accumulations Act, 1892, apply in the Colony (and, of course, the Law of Property Act, 1925, s. 165, does not apply), so that there is no restriction upon accumulations other than that imposed by the rule against perpetuities. There is, in a sense, an indirect restriction arising from the fact that land must vest within the perpetuity period, when the person thereupon entitled can put an end to the accumulations.

It has already been indicated that there is no legislation in the Colony which corresponds to the Settled Land Acts, so that if it is desired to effect a strict settlement of the same type all the relevant powers should be provided. On the other hand, it follows that it is possible to restrict the use of land in a way that the Settled Land Acts would not allow it to be restricted, nor is the device of a trust for sale so necessary to keep the trusts off the title. In general the practice in the Colony is to leave the legal estate outstanding in the trustees by declaring the use to be in them, *i.e.*, by the employment of the words "unto and to the use of."

It appears that the Statute Quia Emptores does not apply in the Bahamas, but it does not seem that any question of mesne lordships exists. De Donis Conditionalibus was stated to apply by the Declaratory Act of the Colony of 1799 (*h*), but was repealed by the Statute Law Revision Act, 1925, of the Colony, as was the Military Tenures Act (*i*).

(*h*) This Act declared certain British statutes to apply in the Colony, and the application of the common law.

(*i*) The Statute Law Revision Act repealed not only these statutes but many more applied by the Declaratory Act. There seems to be no warrant for the repeal of De Donis, which raises the question of whether conditional fees have not been restored in the Colony, which may not be by any means an academic matter, especially in a tax-planning context. The repeal of the Military Tenures Act is another matter for the Declaratory Act provided that so much of the common law as related to ancient feudal tenures did not apply.

Curtesy and Dower

It would appear that tenancy by the curtesy is extant in the Colony, although one does not come upon many references to it, and the position seems to be that on the death of the wife intestate, the husband, if he had children by her capable of inheriting, is entitled to an estate for his life in her heritable freeholds. The position with regard to dower is somewhat archaic. It will be in mind that, unless a wife had, before her marriage, given up her right to dower in consideration of a jointure, she was entitled, if her husband died before her, to dower out of all the heritable lands which had at any time vested in him of which any issue might possibly have been heir.

In England, until the enactment of the Dower Act, 1833, this right attached in spite of any sale or disposition of the lands. As a result of the Dower Act the husband could bar the right to dower by a declaration by deed or will, or it could be defeated by alienation of the lands. The Dower Act does not apply in the Colony, so, to this extent, the position is the same as in England before the Dower Act. Until the Fines and Recoveries Act, 1833, a release of dower could only be obtained by means of a fine, the wife being separately examined. After that Act she could renounce her right by deed acknowledged. The Fines and Recoveries Act does not apply in the Colony (although, as has been seen, fees tail can be barred under the Estates Tail Barring Act), but an Act of the Legislature of the Colony provides for renunciation of dower by a wife by deed acknowledged. The fact that the right cannot be defeated by the husband is, of course, highly inconvenient in the case of legal estates. It may be noted that dower does not attach to an equitable estate so it might be desirable to appoint trustees for realty in the Colony, a matter that should be borne in mind in connection with the purchase of property in the Bahamas in connection with "death duty deals."

Under the Assignment of Dower Act of the Colony, the court, in an action in which the right to dower is established, has power: (i) to issue a commission directed to one or more persons to enter upon the lands and set apart one third part to satisfy the dower; (ii) to order compensation in money up to one-third of the value of the lands; (iii) to take such summary means of ascertaining what should be paid as the court should deem expedient.

CONVEYANCING AND VALUATION

By W. A. Leach, f.r.i.c.s.

A. Introduction

1. The skills of the conveyancing solicitor and the surveyor are extensively complementary so that it is desirable that each should have some knowledge of the work of the other. My task is to say what I think a conveyancing solicitor should know of the work of a surveyor in a property transaction. I speak only as an urban surveyor (*a*) and do not claim that these notes are at all exhaustive.

2. Perhaps the best starting point is valuation, for what a surveyor values is a fasciculus of legal rights and obligations attached to a particular piece of land. The surveyor must, therefore, have a fairly wide grounding in legal knowledge and the law papers in the examinations of the Royal Institution of Chartered Surveyors fully recognise this. The conveyancing solicitor, on the other hand, should be able to understand the language of a surveyor's report and know what matters the surveyor considers when making a valuation, so far as they are relevant to the work of the solicitor, and how these matters may affect the valuation.

B. Years' Purchase

3. When one buys an annual income one buys the right to receive sums of money payable regularly at increasing distances of time and it is necessary to be able to calculate the "present value" or "P.V." of all these sums. This may be done in two ways, both giving the same answers; but before these are explained it should be mentioned that for purposes of simplification in valuation it is common practice to assume that each year's income (although payable by quarterly or other instalments) is receivable at the end of the year (unless the rent is payable yearly in advance).

4. The first method of calculating the present value of an annual

(*a*) The profession of a surveyor is a wide one and a corporate member of the Royal Institution of Chartered Surveyors may be qualified as an agricultural surveyor, building surveyor, quantity surveyor, mining surveyor or valuation surveyor. In the examinations there are subjects common to all categories and in addition each category has its own special subjects, *e.g.*, only the agricultural surveyor is concerned with the valuation of tenant-right, building and quantity surveyors must have a special knowledge of building construction, mining surveyors a special knowledge of underground surveying and matters connected with subsidence, while valuation surveyors must have the more generalised knowledge necessary to the valuation and management of all types of urban property.

income is that of considering each year's income separately. The price paid for the income due at the end of the first year must be such that the income is equal to the price paid for it together with interest thereon for one year at the required rate of interest. The price paid for the income due at the end of the second year must be such that the income is equal to the price paid together with compound interest thereon for two years at the required rate of interest, and so on. Then if the prices paid for each year's income for the whole period during which income from that source is receivable are added together one has the price to be paid for the entire income.

5. If the income is £1 per annum and the required rate of interest or "yield" is 6 per cent., the price for the first year's income will be the amount which, with interest added at 6 per cent. for one year, will equal £1, and for the second year's income the amount which, with compound interest added for two years at 6 per cent. will equal £1, and so on. The individual amounts are the "present value" of £1 receivable at the end of one year, two years, etc. These and many like amounts have been worked out and incorporated in published tables for a wide range of rates of interest and for periods of one to 100 years. The tables are headed "Present value of £1 receivable at the end of a given period of years." Turning to the 6 per cent. tables, the present value of the first year's income of £1 is £·943 and of the second year's income £·890. If one goes on for twenty-one years the aggregate of the reducing yearly amounts will be £11·764 and if one goes on in perpetuity the aggregate will be £16·6, or, to three decimal places, £16·667.

6. These aggregate amounts have also been worked out for a wide range of interest rates and for periods of years up to 100. The tables are headed "Present Value of £1 per annum" and a factor derived from these tables for the required yield and term of years is known as the "years' purchase" or "Y.P." for the rate and period. Thus it can be found at once from these tables that if the required yield is 6 per cent. and the term of the income is twenty-one years, the years' purchase is 11·764, and for perpetuity 16·667. The Y.P. for a definite term exceeding 100 years can be readily calculated by the use of the two sets of tables referred to above, but unless the sums involved are large or the rate of interest adopted is less than $4\frac{1}{2}$ per cent. there is no appreciable error (remembering that valuation is an art rather than an exact science) in taking terms of 100 to 150 years as 100 years and terms over 150 years as equal to perpetuity.

7. If the annual income is more than £1 it is, of course, simply multiplied by the appropriate years' purchase as in paragraph 12.

8. The second method of finding the present value of an annual income is to regard each year's income as representing in part interest on the purchase price and in part an annual sinking fund to replace the capital outlay over the term of the income. An annual sinking fund is an amount set aside year by year and invested to earn compound interest (*aa*), the amount being such that at the end of the term of the income there will be accumulated a sum equal to the original capital outlay. The annual amounts required to produce £1 at various rates of interest and over terms of years up to 100 are given in published tables of "Annual Sinking Funds for the Redemption of £1 Capital invested."

9. If the purchase price of the income is £1, the yearly interest thereon may be represented by "i," and the required yearly sinking fund by "s," the total required income being $(i+s)$ and the relationship of capital to income being $\frac{1}{i+s.}$ For example, if the required rate of interest is 6 per cent. and the term of the income is twenty-one years, the value of i will be 6 per cent. of £1 = ·06 and the value of s (from tables) ·025, and the years' purchase will be $\frac{1}{\cdot 06 + \cdot 025} = 11 \cdot 764$ Y.P.

10. If the income is receivable in perpetuity no sinking fund will be required and the value of s will be zero; consequently the years' purchase will be $\frac{1}{i}$ *e.g.*, at 6 per cent., $\frac{1}{\cdot 06} = 16 \cdot 667$.

11. In the case of freeholds the provision of a sinking fund is not normally necessary and the whole income can be taken as "remunerative" or as the yield, but in the case of leaseholds, which are wasting assets (unless the term of the lease is so long that the wastage can be disregarded), the sinking fund is a very important matter in the valuation (*b*).

C. Freehold and Leasehold Interests

12. *The calculation: freeholds.* The simple case in valuation is that of a fee simple interest in a property let to an average tenant at a fixed fair rent under a lease for a very long term, the building being sound and suitable to the locality so that the rent can be regarded as secured for an indefinite period. In such a case the usual assumption is that the rent will be receivable in perpetuity. Therefore, if it is considered that the proper yield

(*aa*) Paras. 17 and 18.
(*b*) Para. 17.

on the investment should be 5½ per cent. and the annual rent is £100 the calculation is:

Net income	£100
Y.P. in perpetuity at 5½ per cent. ..	18·2
Value of freehold interest	£1,820

13. In cases which are not so simple it may be possible to foresee at the end of a not-so-long current lease that a higher rent will be obtainable, or that after an estimated number of years the buildings will be worn out or so far obsolete that the property should then be regarded as a site for redevelopment. In this context it may be noted that a surveyor uses the expression "reversion" in a way which may seem loose to the lawyer. Thus a surveyor may see after an existing lease a reversion to a higher rent, or after an estimated term of years a reversion to site value. In either case the future is broken into two periods: (a) the immediate future for the duration of an existing lease or the life of the existing buildings, and (b) the deferred future following (a). Each is separately valued and the aggregate of the two gives the value of the entire interest.

14. The immediate future (a) in paragraph 13 will be valued by multiplying the rent by the years' purchase for the required term and yield as in paragraph 12. As regards the future interest (b) in paragraph 13, if a future rent of £600 per annum is foreseeable, the yield required is 8 per cent. and the life of the buildings is indeterminable, the reversion will be to £600 multiplied by 12½ Y.P. $\left(\frac{100}{8}\right.$: see para. 10) giving £7,500. If this rent of £600 per annum will not be receivable for twenty-one years it will be necessary to calculate the present value of £7,500 deferred twenty-one years at 8 per cent. This requires reference to the tables headed "Present Value of £1 receivable at the end of a given period of years" (*c*). The "factor" for twenty-one years at 8 per cent. is ·1987 so that the present value of £7,500 deferred for this period and at this rate is £1,491. Some valuers call all these factors "years' purchase," but that expression is strictly applicable to the factor for the "Present Value of £1 per annum".

15. In another valuation it may be necessary to allow for future expenditure on modernisation, etc., when the present value of the estimated outlay deferred for the period until it must be incurred must be deducted from the valuation. This present value is obtained as in paragraph 14.

(*c*) Para. 5.

16. In the case of land suitable for development, the value is commonly estimated at a price per acre, square yard or square foot (the last two are usually referred to "per yard super" and "per foot super," written "per y.s." or "per f.s."). The price per unit is arrived at from experience or from records of past sales of comparable land; but a check valuation may be made by the "residual method of valuation." In this method an estimate is made of what the developed land could be sold for; from this are deducted all the expenses likely to be incurred in the process of development, allowance is made for loss of interest on the capital outlay during the estimated time for the development to be carried out and a further allowance made for developer's profit, for a developer going to considerable trouble and taking the risk of the development being successful and the market not going sour before he is ready to part with it, naturally looks for a recompense beyond mere interest on the capital employed, which could have been had without the trouble and risks taken.

17. *The calculation: leaseholds.* Additional problems arise in the case of leaseholds. It was shown in paragraphs 8 and 9 that the years' purchase allows for a yield on the investment and for the provision of an annual sinking fund. From a tax angle, however, an owner is not allowed to treat his investment in a leasehold interest as being in a wasting asset; income tax is payable on the whole income so that the annual sinking fund has to be found out of taxed income and with tax at 7s. 9d. in the £ it takes £1 12s. 8d. of income to provide £1 for sinking fund.

18. Then the sinking fund has to be invested and the interest invested to accumulate at compound interest, but the interest is itself taxed so that the net interest available for re-investment is little more than half the earned interest. Moreover, although in the case of an investment institution the sinking fund and interest are just small additions to the larger funds to be invested, to other owners they may be small odd amounts to be invested, and to do this with proper security the usual alternatives are a sinking fund policy in an insurance company, the Post Office Savings Bank, National Savings (within its limited amounts) or a building society investment. For these reasons it is usual to calculate sinking funds at about $2\frac{1}{2}$ per cent. net of tax (during the Socialist Government cheap money period following the 1945 election lower net rates were often adopted in calculations). If the term of a leasehold interest is n years, the yield required on the investment (the "remunerative rate of interest") is i per cent. and the rate at which a sinking fund can be accumulated is s per cent., the years' purchase has to be ascertained for n years at i per cent. and s per

cent. This is called "valuation at dual rates." Further, as the sinking fund payments must be found out of taxed income, allowance for this must be made in the years' purchase, when the operation is called "valuation at dual rates with allowance for tax."

19. Tables are published giving the years' purchase for terms up to 100 years at various remunerative rates of interest coupled with various sinking fund rates of interest, both with and without allowance for tax at various rates in the £. The formula for these calculations without tax is that given in paragraph 9, *i.e.*, $\text{Y.P.} = \frac{1}{i + s}$ where i is the interest on £1 at the remunerative rate and s is the annual sinking fund to produce £1 in the required time at the sinking fund rate. The formula where tax is to be allowed for is $\text{Y.P.} = \frac{1}{i + s\left(\frac{1}{1 - t}\right)}$ where i and s are as before and t is the rate in the £ of tax expressed as a decimal of £1, *e.g.*, if the term is twenty-one years, the remunerative yield required 6 per cent., the net annual sinking fund rate is $2\frac{1}{2}$ per cent., and tax 8s. in the £ $\text{Y.P.} = \frac{1}{\cdot 06 + \cdot 0368\left(\frac{1}{1 - \cdot 4}\right)} = 8 \cdot 243.$

20. As conveyancing solicitors know, a consideration affecting the value of leasehold interests in certain types of property (*e.g.*, good class shops and offices) where the unexpired term of the lease is fairly short, so that the sinking fund is a considerable element in the valuation, is that pension funds are not generally liable to taxation. Consequently their sinking funds are provided out of untaxed income and the interest at which they accumulate is also untaxed. Trustees of pension funds are, therefore, often competing for such interests since, if they can acquire them at a price a little above what a normal taxpayer would pay, they secure an investment showing a very good remunerative yield.

21. On the other hand, a man paying surtax at a high rate cannot economically purchase a leasehold interest since his net income after payment of tax may be insufficient to provide even the annual sinking fund. Such an investor may prefer a freehold property let at a low rent for a fair period with the prospect of capital appreciation as the opportunity for revising the rent comes nearer. This does not apply to the purchase of a residence for occupation, for the Schedule A net annual value is usually far below the rent that would have to be paid, *e.g.*, if by buying a flat a man saves £1,000 p.a. rent exclusive of rates, repairs,

services, etc., and pays tax on a net annual value of £300, the sinking fund can, so long as that state of affairs endures, be paid out of untaxed income and a fair yield on the investment will remain.

22. All such matters affect the extent of the market and the surveyor must always consider who may be in the market for the property he is valuing.

23. *Other factors affecting leaseholds.* Leasehold interests are subject to contractual obligations which may sometimes react unfavourably. Thus, if a high rent is payable, it must be found whether or not the premises are let or occupied by the lessee, so that in bad times he may have to find the rent for a prolonged period out of other income (if any). Again, the higher the rent the more marginal does the lessee's income become: the full burden of any fall in the rental value of the property falls solely on the lessee's income, and if the fall is severe and the rent he pays very high his income may be completely obliterated. These points are naturally far less important where the property has been sublet to a substantial tenant for the residue of the lease.

24. Other obligations which may become burdensome are restrictions on user where the character of a neighbourhood changes. This may result in an inability, at any rate without trouble, delay and expense, to benefit from an improvement in values, *e.g.*, where commercial values arise in a residential area accompanied by a fall in the residential values: also an inability to cut losses, *e.g.*, by letting in multi-occupation a house which has become too large and obsolete in style and planning for single occupation.

25. Obligations to repair are not normally unduly burdensome since even a freeholder must repair to maintain the value of his property; but a lessee may be less free to choose a time for the work most convenient for his financial situation from time to time or most suitable from the point of view of management, as when it is known a tenant will be vacating and it is desired to defer repairing so that the work can be done to suit the new tenant.

26. The expense and delay in securing the landlord's consent to physical alterations to the premises is again not normally unduly burdensome since a tenant is not always carrying out alterations; but the obligation in this connection and, as a rule, also to get consent to assign or sublet (or at least to register assignments and sublettings) do mount up to make a leasehold interest just less attractive than a freehold and a higher remunerative yield will be required, how much higher depending very largely on how far the

income is marginal (*d*). Nevertheless some property companies have a preference for the higher yield from leasehold interests.

27. A point sometimes met is that the leasehold property offered is one of a number comprised in a single lease. Even if the rent has been formally apportioned there is still the risk that the purchaser may become involved in forfeiture proceedings for breach of covenant as to user, repair, etc., by a purchaser of another of the properties comprised in the lease. If the rent has not been formally apportioned the property he is buying may be distrained upon for the whole rent payable under the lease. For these reasons a property in a "multiple lease" (to borrow a convenient term from the Landlord and Tenant (War Damage) Acts), where the rent has not been formally apportioned and the covenants severed, may be expected to show a higher yield than would otherwise be expected. The information on which a surveyor has to make his valuation is often incomplete or inaccurate so that the facts as disclosed in the investigation of title should be submitted to him for comment.

28. *Underleases.* Underleases are, of course, less attractive than a head leasehold interest. The income is usually more marginal (*e*) and there is the risk of breach of covenant by the head lessee, unless all the obligations other than the payment of rent have been passed on to the underlessee. There are two or more landlords who must consent to physical alterations and whose solicitors' and surveyors' charges must be paid, and the same may be true as to assignments and sublettings and the registration thereof. On the whole, therefore, an investor would look for a somewhat higher yield from an underleasehold interest.

29. It is always important in such cases to know what rent is paid by the lessee-landlord. If his interest is profitable to him forfeiture thereof is unlikely, but if the rent payable by him equals or exceeds that payable under the underlease (as where the original underlessee unwisely paid a premium for the tenancy) forfeiture may be a very real risk, when the underlessee may only obtain relief on terms including payment of the higher rent. (As a general rule where an underlessee pays a premium for an underlease it should not exceed what is necessary to reduce the market rental value to a figure midway between that and the rent payable by the lessee-landlord.) See also paragraph 39.

30. If the headlease comprises property other than that in the underlease the underlessee may become involved in breaches of covenant in respect of the other property (*f*).

(*d*) Para. 23.
(*e*) Para. 18.
(*f*) *Cf.* para. 27.

31. Some of the necessary information may not be available to the surveyor when he makes his valuation—an underlease is very often offered as a leasehold interest, and an informally apportioned rent is set down simply as the rent payable. The rent payable under the head lease (which is really vital knowledge to an underlessee paying a premium or to a purchaser of the interest paying a substantial sum or proposing to spend a substantial sum on alterations) is usually unknown. The conveyancing solicitor should, therefore, always be alert for matters which might not have been before the surveyor when he made his report, but which may be material to the value of the interest being acquired. Needless to say, a purchaser's solicitor should always have a copy of the surveyor's report before him. The client is not best served where the solicitor and surveyor act as in watertight compartments, the work of one following that of the other as if they were not connected in the single task of securing a satisfactory investment for the common client. Having worked for many years for a property-owning company where the staff solicitors referred to the staff surveyors everything likely to affect in any way the value and future management of the property being purchased, I can speak for the value of such co-operation. Because every point was properly considered and often many questions asked the charge of fussiness was sometimes made, but if all solicitors and surveyors had to live for years with their purchases they would appreciate better the advantages of asking questions at a time when answers are most likely to be obtainable. It is very easy to say that the purchaser must take a business risk, but why should he buy trouble and litigation just to save the vendor and his solicitor the trouble of finding an answer to a fair question? Very often the answers to fair questions are not available because the questions were not asked when the vendor purchased the property.

32. *Reference back to surveyor.* Many other legal considerations may affect a valuation and, unless it is clear from the surveyor's report that he has been given correct information in these matters, there should be no hesitation in advising the common client that the surveyor should be asked whether this or that burden, obligation or other material disclosed in the usual searches and investigation of title would affect his valuation. If the client started by obtaining a valuation, presumably he desires his valuer's opinion on all matters arising which may affect the valuation; it would also seem no more than fair to the surveyor to give him the opportunity for comment. So far as relevant to his valuation and not involving any considerable and unusual

consideration and investigation the surveyor should be willing to comment freely.

D. General Matters Arising on a Purchase

33. *Routine matters.* The following routine points sometimes arise:

Land Tax. Often not disclosed to the surveyor.

Tithe Redemption Annuity. Often not disclosed to the surveyor.

Tenancies. Particulars as given to the surveyor often incorrect, especially as to tenants' repairing obligations and insurance and as to provisions for tenants to refund the cost of services, etc.

Any discrepancies should be referred to the surveyor so that he can evaluate the effect on the purchase price.

34. *Plan or description.* It would seem self-evident that it should be possible, armed with the plan or description to be inserted in a conveyance, to go onto the land and say "This is clearly the land and these are clearly the boundaries". In fact this is often not possible and even in modern deeds one may find the description "bounded on the south by the land of Mr. Dogsbody" who may have died over a hundred years ago and have sold the land before that. A good description should not require an historical investigation of the ownership of the adjoining land, and a plan which can only be checked by investigating the history of road widenings and the formation of new streets is not one to be repeated in a new conveyance. There seems, however, to be no general practice of checking an obsolete description or plan. A new plan (which may, subject to licence and payment of royalties, be based on the appropriate Ordnance Survey Map as in the case of registration) is often desirable. This may be prepared by the surveyor of either party and checked by the other. However, in these days of sub-sales and pressure to complete it may sometimes be necessary to accept a nebulous boundary provided it is not in a position in which the value of the property might be materially affected.

35. *Dividing walls and fences.* So little attention has been given in the past to defining the ownership of walls and fences dividing the lands and buildings of adjoining owners that little definite information can be obtained today. If it can be obtained the result may advisedly be shown on the plan; otherwise assumptions are perhaps best left until an issue arises. The position may, however, require special consideration where the land is to be

developed or further developed and it is advisable to know the clients' intentions.

36. *Easements.* The surveyor should have noted and mentioned in his report any apparent easements enjoyed by or over the property being purchased, except that unless he knows that the purchase is being made for purposes of development or he has valued the property as having some development value, he would probably not mention that development might be restricted by apparent rights of light of adjacent properties. Conversely, it is a normal assumption that old windows in an old building enjoy rights of light, but the investigation of title may show that this is not so in a particular case. In the case of a modern building it would probably not be mentioned that there might be a risk (subject to town planning control) of its windows being obstructed by developments on adjacent land, although reference should be made to important windows vulnerably close to a boundary and to light enjoyed over land which is obviously a site cleared of buildings of recent years, for here are risks to the value of the property. There may, however, be express or implied grants or reservations of light to be considered or agreements with adjacent owners as to the position and height of buildings which may be erected on the respective lands. There may be other agreements relating to contributions to the cost of maintenance of a right of way or the power of determining a right of light or way. Again, easements of drainage, favourable or adverse, may not be apparent on the land, but there may be agreements as to maintenance or termination. Unless the solicitor feels competent to say that these matters would have no effect on the value of the property he should refer them to the surveyor or advise his client that this should be done. See also paragraph 50.

37. *Restrictions on user.* These may seriously affect value, and in the ordinary sale by private treaty the purchaser's surveyor may well have been given no inkling of their existence. When a private dwelling-house, valued as such, is restricted to that user, no problem arises; but the surveyor's report should be studied for any indication that he has had in mind some idea of development in the future when making his valuation. When valuing a *freehold* it is not a normal assumption that development might be denied by a restrictive covenant, however advisable it might be that a surveyor should bear this possibility in mind where his valuation is influenced by development possibilities. Unless, therefore, it is clear that in the circumstances the restrictions could have no effect on the value of the property, the comments of the surveyor should be invited thereon. In the absence of information to the contrary

a surveyor would assume that a retail shop could be used for any retail trade. If there are limitations on the width of the user then obviously their effect on future lettings or assignments, and hence on value, must be considered.

38. In view of case law on shop users and the overlapping nature of present-day retail trade, landlord's covenants as to the user of adjoining and adjacent shops are sometimes badly drawn. A covenant by a lessee to use for one particular trade and by the landlord not to let other shops for that trade may be workable; but where the lessee is allowed a trade and ancillary trades, or where the landlord covenants not to let other shops for a specified trade or any part thereof, the cumulative effect of a few leases can create an entirely unworkable position. The effect of all such covenants must be considered with the surveyor to ascertain their combined effect on future lettings and values and the solicitor should consider whether there is not in effect already a breach of the landlord's covenant (that has been found in the case of a new parade where a number of shops still remained to be let and despite the assertion that counsel had advised). If the landlord did not own the adjoining shops the tenant could not ask for a protective covenant and would have to rely on his own business skill. Where the landlord does own the adjoining shops there is a probability that he will have regard to this on future lettings for the sake of his own interest, but covenants should not be given.

39. *Concurrent leases.* The situation is sometimes met where a lease has been granted to A subject to an existing lease to B. By way of example it is proposed to take the case where V sells to P a freehold property already let to T and on completion of purchase V takes back from P a lease subject to the existing lease to T, a common enough operation today. In such a case P becomes momentarily T's landlord to be replaced by V as soon as the lease back is completed. T, therefore, will pay his rent to V who is a tenant, but T's lease is not an underlease. What P has done is to divide the reversion on T's lease as regards time and T cannot be prejudiced by dealings with the reversion. V has become T's landlord and if V is willing to accept a surrender of T's lease (possibly it is at a high rent or T's covenant is very sound so that V could demand a fine for accepting the surrender) or if T is prepared to pay V a substantial premium to have his rent reduced, P has no ground of complaint against T. If V's lease has to be forfeited and P finds that T's valuable covenant has gone or that T is only liable to pay a nominal rent, his only remedy is against V if V has covenanted not to vary T's lease. In the circumstances that remedy might be worthless, and the

value of the property for the term of T's lease is, therefore, no more than the value of V's covenant to pay his rent and fulfil his other obligations. A similar position arises where T's rent is already a low one: the failure of V would leave P with at best that low rent for the residue of T's term so that at best the excess of the rent payable by V over that payable by T is not secured by the property, but only by V's covenant for what that is worth. Another effect of concurrent leases is that P could not distrain on T for V's arrears for that would be to prejudice T by a dealing with the reversion and it may be doubted whether T could even be required to pay his rent to P. Moreover, T will not be deemed to have notice or be bound by any restrictions in V's lease, which must be drafted with regard to V's powers as against T under the lease to the latter bearing in mind its possible renewal under Part II of the Landlord and Tenant Act, 1954, if applicable.

40. These possibilities are not always appreciated by surveyors or, in fact, by solicitors, and anything of this nature should be brought to the notice of the surveyor so that the effect thereof on the transaction being negotiated can be considered.

41. *Town planning: possibility of compulsory acquisition.* In most cases a property will have been valued for its existing use (or assumed existing use) or for the purposes of a development for which planning permission, at least in outline, has been obtained. Consequently, planning control broadly has little effect on the majority of valuations. Any conditions in a permission would be matters for consideration by the surveyor. If the valuer is influenced in his valuation of the land by the possibilities of development for which there is no actual permission he should have checked the zoning in the development plan and have made tentative inquiries as to what development would be likely to be permitted and the extent thereof. Unless it is important for contracts to be exchanged at an early date it is most desirable that a planning application should be made even if only in outline and the outcome awaited or provision made for rescission of the contract if permission is refused or granted subject to onerous conditions.

42. As regards the "existing use" it is essential to know that it is a use which has been carried on for at least four years (if there is no planning permission therefor) so that it is secure against enforcement procedure. Sometimes that it is is almost common knowledge (*e.g.*, an old-established shop) and sometimes it may be almost academic to require the position to be regularised by a planning permission being obtained (*e.g.*, where an office in the middle of a shopping parade has been converted into a shop and

is used within Class I of the Use Classes Order, 1950). It is, however, to be kept in mind that the surveyor's valuation has probably been made on the assumption he is entitled to make in the absence of information to the contrary, *viz.*, that the existing use is a lawful one. Recent alterations should have been noted by the surveyor so that it may be checked whether planning permission has been obtained where necessary (together with by-law and any other necessary consents). The possibility of alterations and changes of use can sometimes be checked from changes in the rating assessments during the previous four years.

43. The existence of an "unexpended balance of established development value" is sometimes a matter for consideration, *e.g.*, where development is a future possibility but no application has as yet been made for planning permission. Further, if there appears to be any risk of compulsory acquisition it may be desirable to know what planning applications have been granted or refused and what permissions have been revoked, while decisions in respect of applications by adjacent owners may be useful in determining what the attitude of the planning authority may be in relation to a future application in respect of the land being purchased. All this information would help in considering what compensation might be payable on acquisition under the terms of the new Planning Bill. The usual local searches will elicit other information, *e.g.*, whether the building is subject to a building preservation order. These matters may affect the valuation in some cases.

44. *Local Acts and by-laws.* In inspecting a building a surveyor will look for breaches of by-laws in the light of his knowledge of their usual requirements; but it is doubted whether as a rule he makes a study of the local code. Codes are today fairly uniform and probably there is little risk in assuming that the local authority have seen that local variations (to which they apparently attach importance) have been complied with. There is, however, a difficulty with local Acts (*g*), since these may impose obligations far more stringent than the general requirements. Means of escape in case of fire is a particular issue which can be most expensive and it is advisable when making local searches to inquire whether there is local legislation on this matter, whether the building has been passed as complying therewith and, if so, when (it may be that there have been structural alterations

(*g*) The county boroughs of Barrow-in-Furness, Bolton, and Stalybridge rely solely on local Acts for building control. Where an authority has a local Act for any matter for which by-laws may be made under the Public Health Act, 1936, the relevant provisions of the local Act must be appended to the by-laws (1936 Act, s. 70).

and changes of user since the approval, which may in consequence be no longer valid). Although a surveyor cannot be expected to be familiar with every local Act and code and local practice as to requirements, it may be different in London where the local law covers a very extensive and important area which is widely known to have its own law. The requirements of the Shops Act, 1950, would be generally in the mind of the surveyor, also those of the Factories Acts so far as they affect owners; but every factory is required to have a certificate as to means of escape in case of fire, and a copy of this should be required where such provision is the responsibility of the owner so that the actual means of escape can be checked against it. In all these matters some reliance is placed on the appropriate authorities having carried out their duties under the various Acts, but means of escape and sanitary accommodation should always have been noted.

45. *Schedule A tax.* The possibility of additional assessments to Schedule A arises where the original assessment was made without full knowledge of the circumstances at the time it was made (in the case of a revaluation the facts in the preparatory year and the year of revaluation are material). The surveyor does not inquire into this when making his valuation, the matter being one for inquiry in the investigation of title. If additional assessments are made the tenant may be required to pay the tax due to the Revenue, but he has the right to deduct the amount thereof from any subsequent payment made by him on account of rent (Income Tax Act, 1952, s. 106), and the purchaser may be the loser. Even a tenant under a " long lease " appears to have this right of deduction. Where this position is likely to arise an indemnity should be sought.

46. *Industrial buildings.* If a building or part thereof is an industrial building as defined in Part X of the Income Tax Act, 1952, regard must be had to the tax allowances for depreciation. This is sometimes a complicated business which may have to be gone into with the vendor's accountants. The sale moneys have to be apportioned between the industrial building and other assets passing (*e.g.*, land, plant and machinery) and this is a matter in which the surveyor should be consulted. It should not be overlooked that when buildings are purchased in a state of considerable disrepair the Revenue regard the initial repairs as capital expenditure and if the building is an industrial one this expenditure may rank for allowances.

47. *Plant and machinery.* Where plant and machinery are included in a purchase it will be necessary to apportion the value thereof so that the appropriate tax allowances can be claimed

under Part X of the Income Tax Act, 1952. Passenger lifts and heating installations fall within this category and it is only necessary that the taxpayer should use the building for carrying on a trade; it need not be an industrial building.

48. *Electricity supply.* Many a purchaser of a building with a lift has probably been caught by the refusal of the local electricity board to give a supply unless the apparatus is converted from D.C. to A.C. If the supply to an existing consumer is changed from D.C. to A.C. the board must bear the cost of adapting the apparatus, but a purchaser is a new consumer and if the board decide the time is ripe for changing the supply and their new A.C. mains are ready, they may refuse to continue the D.C. supply. The change-over can be costly and inquiry should be made to the board before contract as to whether the existing supply is A.C. or D.C. and in the latter case whether it would be given to the purchaser. If not, there is a tarnish on the property and the surveyor should be asked to consider the question of asking a reduction in the purchase price.

49. *New buildings.* When buying a new building it is advisable to inquire whether the contractor's maintenance period has expired, and if not to take over the benefit thereof. Inquiries should also be made as to any promises made to tenants as to maintenance during the early life of the building, for it is most undesirable for the purchaser's management of the property to commence with a refusal to carry out work for tenants holding under repairing leases which was promised by the vendor but not recorded in the leases. The promises, if any, should be regarded as liabilities to be honoured by the purchaser and evaluated as a preliminary to considering whether some modification of the purchase price ought to be sought.

50. A new building may obstruct the light and air of an existing building and if it does the purchaser might be liable, if the adjoining owner has easements in respect of the light and air, for continuing the obstruction. The vendor should first be asked to state to whom notices of the intended building were given and what answers were received, copies to be supplied. The surveyor should be asked to consider whether these were adequate in the circumstances. If there is any doubt the vendor might reasonably be asked to give an indemnity.

51. *War damage.* Where there is an outstanding cost-of-works claim the surveyor is the appropriate person to assess the value thereof when information is available either as to the damage reported to the War Damage Commission or as to any specification of war damage repairs subsequently agreed with the Commission.

NOTES OF RECENT CASES

1. *REAL PROPERTY AND CONVEYANCING*

By F. R. Crane, ll.b., Solicitor

Ryan v. *Pilkington* [1959] 1 W.L.R. 403;
[1959] 1 All E.R. 689 (C.A.)

Sale of land—payment of deposit to estate agent—whether stakeholder or agent for vendor—extent of implied authority given by vendor.—The payment of a deposit either to estate agent or to solicitors acting for the vendor, is an almost invariable incident in the course of a sale of land, and there is a good deal of settled law on the topic. (See Walford, *Conditions of Sale of Land*, 2nd edition (1957) pp. 15–18.) The Court of Appeal (Hodson, Morris and Willmer L.JJ.) were therefore somewhat surprised to find no previous decision dealing directly with the extent of an estate agent's implied authority as regards taking a deposit when he is instructed simply to find a purchaser. On such instructions an estate agent found a purchaser "subject to contract" and took two separate sums, each of £100, as deposit, signing the receipts respectively as "agent for X [the vendor]" and "as agent" (the latter receipt being indorsed on the former). Before a formal contract was signed the vendor withdrew and the question now was whether the purchaser could recover his deposit from the vendor—the estate agent not being worth powder and shot. Counsel for the plaintiff had to concede that the agent had authority to take a deposit as stakeholder—that is, as agent for both parties.

The Court of Appeal held the principle applicable to be that stated in Bowstead on *Agency*, 10th edition, para. 82, and cited in *Navarro* v. *Moregrand, Ltd.* [1951] W.N. 335 at p. 336, *viz.*: "every act done by an agent in the course of his employment on behalf of the principal, and within the apparent scope of his authority, binds the principal, unless the agent is in fact unauthorised to do the particular act, and the person dealing with him has notice that in doing such act he is exceeding his authority." The latter part of this quotation was not relevant here, the vital question being the apparent scope of the authority. The court held it covered the taking of a deposit as agent. "Looking at it through the eyes of a reasonable prospective purchaser, it seems to me that the act of the estate agent in taking a deposit is within the scope of the apparent authority which is given to the agent by his principal. Even though there are no express words except 'find a purchaser' I think that the authority extends far enough to enable the agent to receive money as agent for his principal" (*per* Hodson L.J. [1959] 1 W.L.R. at p. 409; [1959] 1 All E.R. at p. 693). The court found no help in the cases deciding that, generally, an estate agent cannot contract for his principal—see *Wragg* v. *Lovett* [1948] 2 All E.R. 968 nor in some dicta by Denning L.J. in a "case which

did not reach the regular reports "—*Brodard* v. *Pilkington* [1953] C.P.L. 275; 159 E.G. 436.

Usually a purchaser desires to pay his deposit to a stakeholder, who cannot pass it on to the vendor and whose financial position, as an estate agent or solicitor, is likely to be sound, whereas that of the vendor is probably unknown. The present case was an exception to the probable position, and the purchaser was fortunate—unlike the vendor, who had to "repay" a deposit he had never received.

Re Emery's Investments Trusts [1959] 2 W.L.R. 461; [1959] 1 All E.R. 577 (Ch.D.)

Husband and wife—presumption of advancement—admissibility of evidence to rebut—intent to evade foreign revenue law.—The continued liveliness of the equitable presumption of advancement as between husband and wife has been demonstrated several times in recent years (*cf. Silver* v. *Silver* [1958] 1 W.L.R. 259; [1958] 1 All E.R. 523 noted *ante*, Vol. 22, p. 225). Though the presumption is rebuttable, evidence to rebut is frequently unavailable. In the present case the necessary rebutting evidence could be provided, but rules of public policy forbade the court to consider it.

The plaintiff, a British subject resident in South America, placed certain American securities in the name of his wife (the defendant), an American citizen, with the purpose—as the court found—of avoiding payment of tax which would have been recoverable from him as a non-resident alien. The marriage having broken down, the husband now sought to recover half the shares. Wynn-Parry J. held that the equitable presumption of advancement arose as to all the shares, but that the husband's intention throughout was that the property should be shared half-and-half. But he also held that if United Kingdom tax had been involved, the plaintiff could not have set up his own illegality to found a claim to equitable relief (following *Gascoigne* v. *Gascoigne* [1918] 1 K.B. 223) and that in such a claim the court would take note of foreign Revenue law even if such laws would not be enforced directly (applying a statement by Denning L.J. in *Regazzoni* v. *K. C. Sethia (1944), Ltd.* [1956] 2 Q.B. 490 at p. 515). Consequently the husband's claim failed. The maxim that he who seeks equity must do equity, or come with clean hands, has been underlined.

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2. *TRUSTS*

By F. R. Crane, ll.b., Solicitor

Re Steed's Will Trusts [1959] 2 W.L.R. 470; [1959] 1 All E.R. 609 (Ch.D.)

Variation of trusts—protective trusts—power of court to override—meaning of "arrangement"—Variation of Trusts Act, 1958, *s.* 1.—

The Variation of Trusts Act, 1958, s. 1, provides that the court may "approve . . . any arrangement . . . varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts" on behalf of, *inter alia*, ". . . (*d*) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined, . . ." The subsection also provides that under this paragraph, (*d*), the arrangement need not be for the benefit of the person on whose behalf approval is given.

In the instant case two separate trust funds were held for the plaintiff upon the protective trusts defined by the Trustee Act, 1925, s. 33, during her life and after her death for such person or persons as she should by deed revocable or irrevocable or by will or codicil appoint. The discretionary part of the protective trust had not yet come into operation, and the plaintiff had by irrevocable deed appointed the trust funds to herself. Under the Trustee Act, 1925, s. 33, the possible beneficiaries under the discretionary trust are the principal beneficiary, any wife or husband or issue of the principal beneficiary, and the persons who would be entitled to the trust fund if the principal beneficiary were dead. As the plaintiff was unmarried and presumed to be past the age of child bearing, a future husband was the only other possible object of the discretionary trust, if it ever came into force. The plaintiff, who did not see eye to eye with the trustees as regards certain dealings with the trust property, now asked the court to approve an arrangement whereby the trustees would hold the funds for her absolutely. The trustees, however, were unwilling to surrender their discretion.

Harman J. held, first, that "the arrangement to which the Act refers must be something arranged between A, B and C, whoever they may be. It is true that the Act specifically provides that there need be no other person beneficially interested capable of assenting to the arrangement; but does that mean that the arrangement can be made by A alone in face of the opposition of the trustees and that such a thing can be called an 'arrangement.' I do not think so" ([1959] 2 W.L.R. at p. 475; [1959] 1 All E.R. at p. 612).

Consequently he applied the rule that the court will not force trustees to surrender a discretion (following *Gisborne* v. *Gisborne* (1877) 2 A.C. 300; see, too, *Tempest* v. *Lord Camoys* (1882) 21 Ch.D. 571 at p. 578 *per* Jessel M.R. and *Re Whichelow* [1953] 1 W.L.R. 5). The learned judge went on to hold, secondly, that the court had an absolute discretion to give or withhold approval, and that in the present circumstances responsible trustees entrusted with the task of looking after the plaintiff's interests should not be overridden by the court.

Some comments may be made. In the first place, it is submitted that the second ground of the decision is much more satisfactory than the first. The definition proposed of "arrangement" recalls the suggestion made when the *Chapman* case was before the Court of Appeal, that there was inherent jurisdiction to approve "compromises" whereby each party thereto gave up some right ([1953] Ch. 218). Yet even this suggestion (subsequently disapproved in the House of Lords) did not allow the *Chapman* trusts to be remodelled.

Nevertheless that has now been done under the Variation of Trusts Act, 1958—see the next note, *infra*. Consequently there is already some indirect conflict of view about the extent of the new jurisdiction. Secondly, does the definition here proposed mean that there must be at least two parties who can consent without the aid of the court—two beneficiaries of full age and *sui juris* with different interests, or one such beneficiary and the trustees? If so, many trusts are likely to be excluded from the operation of the Act. It is to be hoped, therefore, that it will prove possible to give a wider interpretation to the word "arrangement." Thirdly, the decision illustrates the potency of the discretionary trust. As is here exemplified, the existence of possible or infant beneficiaries under such a trust prevents the remaining beneficiaries of full age and *sui juris* from putting an end to the trust. Even if the court now has a statutory jurisdiction so to do, it is still likely to be reluctant to override trustees in whom the testator has placed faith. (If the settlor is still alive he must be made a party—R.S.C., Order 55, r. 14A, para. 3A; S.I. 1958, No. 1246. Presumably the court would give especial weight to his views.) The effect of the discretionary trust in a trust-breaking situation should be borne in mind by draftsmen of wills and settlements.

Re Chapman's Settlement Trusts (*No.* 2); *Re Rouse's Will Trusts* [1959] 1 W.L.R. 372. *Re Coates' Trusts*; *Re Byng's Will Trusts* [1959] 1 W.L.R. 375. *Re Oakes' Settlement Trusts* [1959] 1 W.L.R. 502; all reported at [1959] 2 All E.R. 47 (Ch.D.)

Variation of trusts—points of substance and practice—Variation of Trusts Act, 1958.—All the above cases are shortly reported, more or less together, for the guidance they give to the working of the Variation of Trusts Act, 1958. Matters of both substance and practice are involved.

Substance of application. The court has approved:

(1) Arrangements designed to save estate duty by varying a discretionary trust (*Chapman*). Thus the initial move in the possible "game of chess" between the courts and the Revenue is the very one which the House of Lords would not make in *Chapman* v. *Chapman* [1954] A.C. 429.

(2) An arrangement whereby a life tenant obtains part of the capital and releases a power of appointment (*Rouse*). Here estate duty might be saved if the life tenant lived for five years, but it does not appear that this was necessarily the principal reason for the application.

(3) Variation of investment clauses to enable trustees to invest in equities (*Coates* and *Byng*). The clause which appears to be of particular interest ran "In or upon the debentures (as defined by the Companies Act 1948) or preferred or preference or ordinary or deferred shares or stock of any company dealt in or quoted on the Stock Exchange of London New York Montreal Melbourne or Johannesburg such company having a paid up capital of not less than £500,000 . . ." (*Byng*). Of course the full and fairly lengthy

clause set out in the report should be consulted by anyone concerned with such an application.

Practice

(1) Applications must be supported by an affidavit setting out the reason for the application (*Oakes*).

(2) It will usually be more convenient to submit an entirely new investment clause rather than merely amend an unsatisfactory one (*Byng*), and applications should be made under the Variation of Trusts Act rather than under the Trustee Act, 1925, s. 57 (*Coates* and *Byng*).

(3) Applications under the Variation of Trusts Act, including applications to vary investment clauses, will be heard in open court, to secure uniformity of practice, unless there are special reasons for hearing in chambers (*Chapman*, *Rouse* and *Byng*).

(4) All interests which it is sought to bind should be represented by counsel (*Chapman* and *Rouse*).

(5) A note of the order made should be indorsed on the probate of the will or on the settlement and a clause to that effect will be included in the order itself (*Rouse* and *Byng*).

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3. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

General Nursing Council for England and Wales v. *St. Marylebone Borough Council* [1959] 2 W.L.R. 308; [1959] 1 All E.R. 325 (H.L.)

In this rating appeal the House of Lords have agreed that the General Nursing Council is not a charity, approving the earlier Court of Appeal decision in the analogous case of *General Medical Council* v. *I. R. C.* ((1928) 97 L.J.K.B. 578). The G.N.C. prescribed syllabuses and conducted examinations but did not take any active part in the training of nurses and hence was not educational enough to be a strict charity. The decision was also based on special statutory grounds. In *Royal College of Surgeons* v. *National Provincial Bank* [1952] A.C. 631 the appellants were a body conducting training and research.

(Theobald 339)

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4. *WILLS*

Re Wells, Wintle v. *Nye* [1959] 1 W.L.R. 284; [1959] 1 All E.R. 552 (H.L.)

Strict standard of proof where beneficiary prepares will—duty of solicitor.—All may be well that ends well, but the history of this litigation is no source of comfort for the legal profession. The steam-hammer has succeeded in crushing the nut, at the cost, at any rate to some extent, of the estate concerned. In this case the law was clear but its application had been inequitable. According to the rule in *Barry* v. *Butlin* (1838) 2 Moo.P.C.C. 480, the court must be vigilant before it admits a will to probate prepared by a principal beneficiary. In this new case the testatrix was an elderly woman who left all her business to her solicitor to manage and who was described by a doctor as unintelligent. Circumstances suggested that she was quite unaware of the extent of her own estate and the magnitude of the benefits conferred by her will on the solicitor, a will of which he kept the only copy. After the House had held against the main provisions of the will the solicitor abandoned all his claims and no new trial was therefore necessary—a decision with which costs no doubt had something to do, as he had already to pay his own costs in the Court of Appeal and the House of Lords. The crushing indictment of Barnard J.'s summing up, justified as it is objectively, does not take into account the unfortunate prologue to this litigation in the assault by Colonel Wintle on Nye, and the overbearing behaviour of Wintle when he appeared in person before the courts. Still, the thinking solicitor will be grateful to this rugged litigant for righting a possible slur on the profession and rehabilitating the public respect for legal justice. English law owes much to "village Hampdens" who insist on their rights. Evidence is always a difficulty where the decedent is not there to give her side of the story. What weighed with the House were the implications to be derived from the respondent's account of events leading up to the will of 1937 and the codicil of 1939 and the interpretation to be more naturally made of these events, *e.g.*, that the will reduced an annuity to testatrix's sister though she had been concerned to make more provision for her, and that the codicil had quite different effects from those which the testatrix, on respondent's own evidence, must have intended. Many old people, again, think they are poorer than they are, but Miss Wells was only 66 when she made her will and a very rich woman.

(Theobald 32)

Re Selinger's Will Trusts [1959] 1 W.L.R. 217; [1959] 1 All E.R. 407

Condition precedent—time not of the essence.—In the interpretation of wills the real intention of the testator is to be gathered from the documents and circumstances. In the present case the testatrix had bequeathed £1,500 to endow beds in a Jewish hospital or institution, to be selected by the trustees. If they failed to find

such a donee, able and willing to provide the beds, within a year of probate, the bequest was to "stand revoked." The trustees delayed over two years before they found a Jewish Home. Harman J. was able to save the gift by holding that the reason for the forfeiture of the gift was the testatrix's fear that the distribution of the estate might be held up while searches went on. In fact, the delay had been mainly due to estate duty disputes, so that no earlier distribution would have been possible. The trustees could have been more diligent in finding a suitable donee but it was not right to have the donee suffer for their delay, as no real harm had been done. It is important in all these cases that there should be no express gift over (following *Re Goodwin* [1924] 2 Ch. 26), not because of any particular desire by the testatrix to benefit an express legatee rather than a residuary legatee or intestate successor, but because the reference to a gift over shows that she was serious about her time-limit attached to the gift. Thus the element of significant silence enters into the interpretation of a will like the rest notes in music! Silence certainly can be significant, but one might perhaps distinguish between a gift of an asset, *e.g.*, of a piano or a house, where one might expect a gift over on breach of condition, and a bequest of an amount of money "out of the blue" where a distinct gift over might not be called for, and a direction to fall into residue might be implied. However, it is reasonable that one person should not suffer for the defaults of another. The draftsman might consider whether a more suitable form might not have been used, imposing a direct duty on the trustee to find such an institution as a home or hospital, and containing some sanction, such as a reduction of a legacy to the trustee if he failed to do so. As the will was drafted in the instant case it was a matter of imperfect obligation and a residuary legatee might have induced the trustees not to attempt to carry out the terms of the will, in which case it is difficult to see what wrong would have been committed in law by anyone.

(Theobald 547)

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5. *LANDLORD AND TENANT CASES*

By D. Macintyre, m.a., Barrister-at-Law

Re Greater London Properties, Ltd.'s Lease [1959] 1 W.L.R. 503; [1959] 1 All E.R. 728 (Ch.D.)

Covenant not to assign without consent—consent not to be withheld in case of respectable and responsible assignee—proposed assignment to company—whether proposed assignee "responsible."—A lease of a shop contained a covenant against assigning the premises without consent, but provided also that such consent should not be unreasonably withheld in the case of an assignment of the whole of the premises to a respectable and responsible assignee. The tenants asked for consent to an assignment to a company, which was a subsidiary

of Allied Bakeries, Ltd., and in substance wholly owned by them; but the landlords refused to give their consent unless Allied Bakeries, Ltd., guaranteed payment of the rent and performance of the covenants in the lease, on the ground that the proposed assignees, though clearly respectable, were not responsible. The grounds of criticism were (1) that the whole of the profits of the company were distributed in dividends to shareholders, in effect to Allied Bakeries, Ltd., and (2) there was a liability of £215,028 to Allied Bakeries which might be enforced at any time. Danckwerts J. held (applying *Willmott* v. *London Road Co., Ltd.* [1910] 2 Ch. 525) that the "responsibility in question is not an abstract one, but is related to the particular circumstances of the case and, above all, to the amount of the obligations which the company is going to undertake: that is to say, the amount of the rent and the burden of the covenants and other obligations contained in the lease." Further, the whole matter must be approached having regard to the circumstances and in a practical and realistic manner. In the present case, although a demand for the large amount owing was theoretically possible, no such demand would in practice be made, since it would be against the interest of Allied Bakeries, Ltd., to make it. Having regard to this fact and to the financial position of the proposed assignee company in other respects, the landlords' refusal of consent was quite unreasonable.

De Jean v. *Fletcher* [1959] 1 W.L.R. 341; [1959] 1 All E.R. 602 (C.A.)

Furnished Houses (Rent Control) Act, 1946—determination of rent by tribunal—reduced rent entered in register—subsequent letting to new tenant at higher rent—whether higher rent recoverable.—The Court of Appeal held in this case that, when once a rent has been entered in a register kept by a local authority under section 3 of the Furnished Houses (Rent Control) Act, 1946, that is the highest rent which can lawfully be charged for the premises until either the rent is changed by some subsequent determination or the period (if any) for which the entry has been made has expired. Although section 2 (1) and (2), taken by themselves, would seem to indicate that the effect of a registration is limited to the duration of the contract in respect of which the application to the Tribunal was made, sections 2, 3 and 4, when read together (especially sections 2 (3) and 4), lead to a contrary conclusion.

Upon an application by previous tenants to the appropriate Rent Tribunal the rent of the premises in question in this case was reduced to £1 per week. The landlord, after spending some £70 on redecoration and improvements of the furniture, subsequently let the premises to new tenants (the plaintiffs) at a rent of £3 per week, which was duly paid for nearly two years. The plaintiffs' claim for recovery of rent overpaid succeeded.

No opinion was expressed on the question whether, for the purposes of the Act of 1946, substantial alterations in or additions to the internal equipment of premises can bring about a change in the identity of those premises, since in the present case the subject-matter of the

letting to the plaintiffs was in fact the same as the subject-matter of the letting to the previous tenants.

Nor was any view expressed upon what the result might have been if only the landlord had applied to the Tribunal for an increase in rent in view of the improvements before he granted the new tenancy (see section 2 (3) of the Act). It may be that the Tribunal would have increased the rent. Therein lies a lesson to landlords.

Rhyl Urban District Council v. *Rhyl Amusements, Ltd.*
[1959] 1 W.L.R. 465; [1959] 1 All E.R. 257 (Ch.D.)

Business premises—lease by local authority—express surrender of lease in consideration of grant of new lease—new lease ultra vires—validity of surrender—yearly tenancy—terms of tenancy—effect of notice to quit—statutory notice to terminate tenancy—validity of statutory notice—Landlord and Tenant Act, 1954, s. 25.—Much of this case was concerned with the validity or otherwise of a lease of business premises purported to be granted by a local authority under certain statutory powers; but there were also questions relating to the termination of tenancies by surrender and by notice to quit and to the validity of a notice to terminate a tenancy served under section 25 of the Landlord and Tenant Act, 1954.

In 1910 the plaintiffs granted a lease of the premises to the defendants for fourteen years from June 1, 1910, but this lease was expressly surrendered in consideration of the grant of a new lease, and a new lease was duly granted for twenty-four years from February 1, 1921. On June 23, 1932, the lease of 1921 was expressly surrendered in order to enable the grant of a further new lease, and a second new lease was granted for thirty-one years from May 1, 1932, rent to be payable on May 1 and November 1 in each year. No consent of the local government board or the Minister of Health, as required by the Public Health Act, 1875, s. 177, was obtained to either the lease of 1921 or the lease of 1932. In June 1954 the plaintiffs, acting on the assumption that the lease of 1932 was void, served notice on the defendants to quit the premises on May 1, 1955, "or other . . . the end of the year of your tenancy which will expire next after the end of one half-year from the service of this notice." On October 1, 1954 (the day upon which the Landlord and Tenant Act, 1954, came into force), the defendants served a request for a new tenancy under section 26 of that Act, but accompanied their notice with a letter stating that the notice was without prejudice to their claim that the lease of 1932 was valid. On October 28, 1955, the plaintiffs served a notice under section 25 of the Act of 1954 to terminate the tenancy on May 1, 1955; and the defendants served a counter-notice, again without prejudice. Upon these facts questions arose as to (1) the validity of the leases of 1921 and 1932, and (2) in the event of these leases being void, (a) the validity of the surrenders of 1921 and 1932, (b) the terms of the tenancy upon which the defendants held the premises when the Act of 1954 came into force, and (c) the validity of the plaintiffs' statutory notice of October 28, 1955.

Harman J., having held (1) that both leases were *ultra vires* and void, since there was no power either under the local Acts upon which the plaintiffs relied or (in the absence of consent) under the Public Health Act, 1875, to grant them, and (2) that since the plaintiffs had no power to grant these leases at all, they could not be estopped from denying their validity, decided that even so the surrenders of 1921 and 1932 did effectively merge the tenancies under which the defendants held at that time in the freehold reversion. Although the grant of a new lease which is void does not bring about a surrender of an old lease by operation of law, the old tenancies in this case had been expressly surrendered by deed. An express surrender of an old lease in consideration of a new lease which is void may, it seems, be voidable: but it is not void.

It followed from this that on and after June 24, 1932, the defendants held the premises as yearly tenants upon the terms of the void lease of 1932 in so far as those terms were applicable to a yearly tenancy. But it then became vital to discover whether, on October 1, 1954, when the Act of 1954 came into force, the year ran from May 1 (when rent was paid under the terms of the void lease) or from June 24. If from May 1, then the statutory notice was valid, since, apart from the Act, the yearly tenancy could have been brought to an end on May 1, 1955; but if from June 24, the statutory notice, since it specified a date earlier than June 23, 1955, was void (see Act of 1954, s. 25 (3) (a)). Upon this point Harman J. accepted that the yearly tenancy began on June 24, 1932. He held, however (after expressing some doubt) that by 1954 the parties must be taken to have agreed that the yearly tenancy should be calculated by reference to the dates upon which rent was paid. But he rejected an argument on behalf of the landlords to the effect that service of a notice to quit puts an end to a yearly tenancy at the date of service of the notice, so that all that remains is a tenancy for a fixed term expiring on the date when the notice to quit expires. Had this argument been well founded, the statutory notice would have been valid in any event, since the tenancy in existence on October 1, 1954, would have been a tenancy for a fixed term (see s. 25 (4)). The tenancy in existence on October 1, 1954, was, however, a yearly tenancy which did not come to an end until the notice to quit expired.

Two further points arose. First, it was held that the defendants had not by serving their counter-notice under section 26 of the Act precluded themselves from arguing that the lease of 1932 was valid, since their accompanying letter showed that they had not definitely elected to rely on the Act of 1954. Secondly, it was held that although by agreeing to grant a new lease in 1932 the plaintiffs had contracted to obtain the consent required by the Public Health Act, the defendants' counterclaim for breach of that contract was statute-barred.

Espresso Coffee Machine Co., Ltd. v. *Guardian Assurance Co., Ltd.*
[1959] 1 W.L.R. 250; [1959] 1 All E.R. 458 (C.A.)

Landlord and Tenant Act, 1954—business premises—application for new tenancy—landlords' intention to occupy holding for their

own purposes—whether necessary intention shown.—The decision of Harman J. in this case (noted at Vol. 22, p. 395) has been affirmed. The difficulty, it will be remembered, arose out of the fact that the landlords, having already served a notice of opposition to the tenants' application for a new tenancy on the ground that they intended to occupy the demised premises themselves for the purposes of their own business (see Landlord and Tenant Act, 1954, s. 30 (1) (g)), subsequently became interested before the date of the hearing in other premises which might have suited their purposes better. The Court of Appeal, whilst recognising the difficulty in which a landlord is placed in cases of this nature, held that a landlord in that position is compelled by the Act to make up his mind whether he definitely intends to occupy the demised premises (or the "holding") or not. In the present case the landlords had in fact established that they had formed a sufficiently fixed and settled intention, even though their negotiations in respect of the other premises had not been completely abandoned.

Leave to appeal to the House of Lords was refused.

Nursey and Another v. *P. Currie (Dartford), Ltd.*
[1959] 1 W.L.R. 273; [1959] 1 All E.R. 497 (C.A.)

Landlord and Tenant Act, 1954—business premises—recovery of possession—landlords' intention to occupy holding for their own purposes—notice accordingly—subsequent intention to demolish and reconstruct—whether original notice valid.—Notices given under the Landlord and Tenant Act, 1954, cannot be amended. If, therefore, a landlord fails to establish the ground of opposition to his tenant's application for a new tenancy which is set out in the landlord's notice, the tenant's application will succeed, even though the landlord would have been able to establish some other ground of opposition, if only he had relied on it expressly.

The landlords in this case sought to recover possession of business premises on the ground that they intended to occupy the premises for the purposes of a business to be carried on by them therein (see Act of 1954, s. 30 (1) (g)). The premises consisted of certain buildings standing in a yard. After service of the landlords' notice but before the hearing the landlords received planning permission to develop the yard as a petrol-filling station, so that at the date of the hearing the landlords intended to demolish the buildings. Upon these facts the Court of Appeal held that the landlords had failed to bring their case within section 30 (1) (g) of the Act and that their claim must fail, even though a claim under section 30 (1) (f) would clearly have succeeded. Nor could the landlords claim that, since they still intended to occupy the land upon which the buildings stood, they intended to occupy the holding. "The holding," for the purposes of Part II of the Landlord and Tenant Act, 1954, means "the property comprised in the tenancy" (s. 23 (3)): and the property comprised in the tenancy in the present case consisted of, or at least included, the buildings.

Re No. 88 High Road, Kilburn [1959] 1 W.L.R. 279; [1959] 1 All E.R. 527 (Ch.D.)

Landlord and Tenant Act, 1954—business premises—terms of new tenancy—date of commencement.—The lease in this case, which was of business premises, was for a term of 36¾ years expiring on June 24, 1958. The rent was £230 per annum for the first seven years and £250 per annum thereafter. On the expiration of the term the tenants claimed a new lease for fourteen years. The landlords were willing to grant a new lease, but only for seven years, since they feared inflation: and there were also disputes with regard to (1) the amount of the rent and (2) the date from which the new term should begin. On an application for a new lease under section 24 of the Landlord and Tenant Act, 1954, Wynn-Parry J. held that the tenants should have security of tenure for fourteen years, and that the rent should be £3,000 per annum: and he also granted the landlords the guard against inflation for which they asked in the form of a clause providing for a review of the rent at the end of the first half of the term, but without any corresponding right for the tenants to terminate the lease in the event of a higher rent being fixed on review. But on the question of the date from which the new term should begin he felt compelled by sections 33 and 64 (1) of the Act to hold that in cases where there is an application to the court an old lease at an old rent must continue, so that a new lease at a new rent cannot begin, until three months after the application to the court (including any appeal to the Court of Appeal and possibly even to the House of Lords) is finally disposed of. He agreed, however, that this situation may cause grave injustice to a landlord in a case where a tenant makes full use of his rights: and in order to protect the landlord against any possible injustice in the present case he ordered that the new lease, when executed, should be, not for fourteen years, but for a term ending on June 24, 1972, *i.e.*, fourteen years from the date when the original term would have expired if the Act of 1954 had not been passed.

M. & J. S. Properties, Ltd. v. *White* [1959] 2 W.L.R. 525; [1959] 2 All E.R. 81 (C.A.)

Rent Acts — Act of 1957 — release from control — meaning of "premises"—whether right to use garden included.—The decision in this case turned upon the meaning of the word "premises" in the proviso to section 11 (2) of the Rent Act, 1957. That subsection, it will be remembered, provides that the Rent Acts shall not apply to a tenancy created by a lease or agreement coming into operation on or after July 6, 1957; but subject to the proviso that "this subsection shall not apply where the person to whom the tenancy is granted was immediately before the granting a tenant under a controlled tenancy and the premises comprised in one of the tenancies are the same as, or consist of or include part of, the premises comprised in the other." The Court of Appeal held unanimously that in the present context the word "premises" means premises capable of physical occupation

and does not extend to incorporeal rights such as the right to use a garden.

Immediately before July 6, 1957, the defendant had been tenant of the ground-floor rooms of a two-storeyed house together with the right to use the garden of the house in common with the tenant of the flat upstairs. Shortly after July 6, 1957, the defendant became a weekly tenant of the first-floor flat (that flat having become vacant) with the right to use the same garden; and this tenancy was duly terminated by a notice to quit which expired on February 22, 1958. In an action for possession by the landlords the defendant contended that since the right to use the garden had formed part of the premises comprised in her controlled tenancy of the ground-floor flat, her tenancy of the first-floor flat was also controlled by virtue of the proviso to section 11 (2) of the Act of 1957, even though this latter tenancy had been created after the Act came into force. In the view of Hodson L.J., however (with whom Sellers and Willmer L.JJ. both agreed), the mischief against which this proviso is directed is that of a landlord who might persuade a tenant to enter into an agreement for a new tenancy of substantially the same premises as he had occupied before solely in order to deprive him of the protection of the Rent Acts. Further, the purpose of the Rent Acts as a whole is to protect tenants in the physical occupation of premises rather than to protect subsidiary rights (such as licences) which may be attached to the premises.

It was acknowledged, however, that in different contexts the word " premises " may well bear a wider meaning. In the present case the court was concerned only with the context of the Rent Act, 1957.

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6. *REVENUE CASES*

By David R. Stanford, m.a., ll.b., Barrister-at-Law

(*Note*:—Where a case is not reported in any of the general series of law reports, it is cited from *Taxation Reports* (T.R.).)

Philipson-Stow v. *C. I. R.* [1959] 2 W.L.R. 427; [1959] 1 All E.R. 583; [1959] T.R. 43 (Ch.D.)

Estate Duty—Immovable Property situate outside Great Britain

Statutory provision: Finance Act, 1949, s. 28 (2).

Point: By Finance Act, 1949, s. 28 (2), there is excluded from charge to estate duty " any property passing on the death which is situate out of Great Britain if it is shown that the proper law regulating the devolution of the property so situate, or the disposition under or by reason of which it passes, is the law neither of England nor of Scotland," provided that in addition one of three conditions is satisfied. Two of these conditions are concerned with domicile and

the third is "that the property so situate is by the law of the country in which it is situate immovable property." "Disposition" in the main condition means a disposition by instrument and "devolution" means devolution by law such as kinship, and any passing must be under one or the other. Thus, where property settled by the will of A passed on the death of B, it passes by reason of a disposition (A's will) and not by devolution.

The proper law of a settlement by will is the law which the testator must have intended to govern the relevant disposition under the will, although it is possible that the proper law of different dispositions in the same will may differ. The proper law of a testamentary disposition of foreign land need not necessarily be the *lex situs*. So far as rights to land are concerned, other laws must give way to the *lex situs* and hence, if a testator devised foreign land to be enjoyed *in specie* by a number of persons in succession, it must almost necessarily follow that he intended the *lex situs* to govern. But if lands are devised to trustees for such persons, that conclusion is not inevitable.

Facts and decision: The testator domiciled in England made a will in English form and in it declared that it should be "construed and operate as far as the case admits according to the law of England." By the will he settled certain property (referred to as his settled estates) in strict settlement. His residuary estate (which included land in South Africa, the subject of the present dispute) he devised and bequeathed to his trustees on trust for sale with power to postpone to be held as if the same were capital moneys arising from the settled estates. The residuary estate passed on the death of the testator's eldest son in 1954 and the question arose as to whether the South African land which had been retained by the trustees came into charge to duty.

Held: Duty was payable. The land passed under a disposition, being the testator's will, which was governed by English law. The indications of the intention of the testator that English law should govern, were the specific direction by the testator quoted above, the direction that payments in respect of certain matters in England should be made out of the residuary estate and thirdly that the residuary estate should be treated as capital moneys of the settled estates. The decisive factor was the last, namely, the blending of the whole of his residue including the South African land into one mass to be held as part of his English settled estate.

An important direction as to the bringing of appeals on questions such as this was given by Upjohn J. in his judgment, as follows:

> "As frequently happens in these cases, the issue of the summons followed long correspondence between the parties in which, apparently, a large number of points of law were taken by the Crown. Mr. Horne, in opening this case, therefore, perfectly properly had to deal with all these points in his opening. When it came to the Crown's turn, all these points, except the two with which this judgment has been concerned, disappeared; and much of Mr. Horne's opening was wasted time through no fault of his own. In my experience, this happens from time to time in estate duty cases. Where, therefore, the argument between the parties

has ranged over a large number of points in correspondence, it seems very desirable that the parties should agree before the hearing precisely upon what points they will rely at the hearing. These points can be put into an agreed statement of points of law so that the court and the parties know exactly what issues of law they will have to meet at the trial. The suitable time for this to be done would seem to be when the matter is before the master, before whom it is desirable that counsel should attend to settle the statement where it is necessary."

Re Tapp (deceased); Master and Fellows of Gonville and Caius College Cambridge v. *C. I. R.*

[1959] 2 W.L.R. 541; [1959] 1 All E.R. 705 (C.A.)

Estate Duty—Continuing Annuity—Passing on Death

Statutory provisions: Finance Act, 1894, ss. 1, 2 (1) (b) and 7 (7) (b).

Point: Where a continuing annuity is payable out of the income of a trust fund to two or more persons in succession, there is a passing within the meaning of Finance Act, 1894, s. 1, on the death of each of the persons so entitled (other than the last to die) of property in the shape of the annuity. The value of such property for estate duty purposes is the value as at the death of the person dying of the annuity for the residue of the period for which it is payable. An annuity payable out of the income of a fund under a trust is not a mere chose in action, as is the contractual payment made under a policy of assurance: *Re Weigall's Will Trusts* [1956] 3 W.L.R. 312 (noted in Vol. 20, p. 339) was therefore specifically overruled.

Facts and decision: By his will a testator made a general residuary devise and bequest to his trustees on trusts for conversion and investment and directed his trustees to pay out of the income of the resulting investments certain annual payments to his wife (who predeceased him) and after her death the sum of £3,000 per annum (the annuity here in question) to A, B and C or such one or more of them as should for the time being be living and if more than one of them should be living to be received by them in equal shares.

On the death of the first annuitant to die, estate duty was claimed and paid under section 1 of Finance Act, 1894, on the actuarial value for the lives of the two then surviving annuitants of the one-third share of the annuity which then accrued to the survivors. On the death of the second annuitant (the death relevant to the present case) the trustees again offered duty on the same basis but the Inland Revenue reversing their previous practice on the strength of *Re Payton* [1951] 2 All E.R. 425 and *Re Weigall's Will Trusts* (*supra*) claimed duty under sections 2 (1) (b) and 7 (7) (b) of the 1894 Act on the slice of the capital of the trust fund producing the half share of the annuity which had been payable to the deceased during his life.

Held: Duty was payable under section 1 of the Finance Act, 1894, the property passing being the annuity which had to be actuarially valued as at the death of the deceased as an annuity payable during the residue of the life of the surviving annuitant. The annuity was a continuing annuity, the trust being to make one continuous annual payment of £3,000 out of the income of the trust fund to the three named beneficiaries or such of them as should for the time being be living during one entire period. There was nothing in the language of the will pointing to the necessity to split the annual payment first into three annuities, secondly, into two annuities and finally into one annuity. The case was held indistinguishable from *Re Duke of Norfolk* [1950] Ch. 467, the similarity between the two cases being the subjection of a trust fund to payment of an annuity to persons in succession, the continuous annual payment of a similar prescribed amount and the duration of the annuity being measured by the life of the last survivor of a group of beneficiaries. The court distinguished *Re Payton* (*supra*) as wholly consistent and even supporting *Re Duke of Norfolk*, for as stated in *Re Payton* itself, the only rights and interests there subsisting arose "exclusively out of the terms of the contract of insurance." The only right therefore in that case was a chose in action which could not "be considered or comprehended apart and separately from the right to enjoy, by the terms of the contract, the benefit contracted to be given."

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7. *PLANNING CASES*

By V. G. Wellings, M.A.(oxon.), Barrister-at-Law

Ealing Corporation v. *Jones* [1959] 2 W.L.R. 194; [1959] 1 All E.R. 286 (D.C.)

Enforcement notice quashed—local planning authority desiring to appeal—"person aggrieved."—A local planning authority is not a "person aggrieved" within the meaning of section 23 (5) of the Act of 1947. Accordingly, where justices under section 23 (4) of the Act have quashed an enforcement notice the authority who served it is not entitled to appeal to quarter sessions from the decision of the justices. So held the Divisional Court. Lord Parker C.J. said that he would like to voice a protest that Parliament continues to allow the expression "person aggrieved" to come into Act after Act of Parliament; it was easier to say what would not constitute a person aggrieved than it was to say what was included in the expression. A local planning authority is not a person aggrieved by the quashing of an enforcement notice because, it seems, no financial or legal burden is imposed upon it as a result of the justices' decision.

([1959] J.P.L. 280)

Eastbourne Corporation v. *Fortes Ice Cream Parlour*
[1959] 2 W.L.R. 630; [1959] 2 All E.R. 102 (C.A.)

Appeal against enforcement notice—jurisdiction in justices to quash on ground of no development.—The Court of Appeal has reversed the decision of the majority of the Divisional Court (1958) 22 *Conveyancer* 314. The court held that the powers conferred on justices by section 23 (4) of the Act of 1947 enabled them to inquire into the allegation which had to be made in every enforcement notice that unauthorised development had, in the opinion of the local planning authority, been carried out. This allegation, so it was held, involved a double inquiry, first, whether there had been " development " after July 1, 1948, or at all, and if after that date, whether it was of a kind that required permission under the Act.

Guildford Rural District Council v. *Fortescue. Same* v. *Penny*
[1959] 2 W.L.R. 643; [1959] 2 All E.R. 111 (C.A.)

Development—increase in number of caravans—whether material change in use of land.—At or about July 1, 1948, there were eight caravans on a $1\frac{1}{2}$ acre field. Subsequently, the number increased to twenty-one, which number the Minister himself permitted when allowing an appeal from the refusal of the local planning authority to grant permission. At the date when an enforcement notice requiring caravans in excess of twenty-one to be removed was served there were twenty-six caravans on the site and at the date of the hearing of the appeal by the land owner under section 23 (4) to the justices the number was twenty-seven. The justices refused to hold that the increase from eight to twenty-seven caravans constituted a material change in the use of the land. The Court of Appeal, taking the view that the question was one of fact for the justices, refused to interfere with their decision.

THE LIBRARY

Prideaux's Forms and Precedents in Conveyancing. 25th ed., Vol. I. Editors: T. K. Wigan and I. M. Phillips. Stevens & Sons, Ltd. and The Solicitors' Law Stationery Society, Ltd. lxiv, 825 and (index) 114 pp. (£6 6s.)

It is ten years since the previous edition of this volume of Prideaux was published. Generally, there has not been any fundamental change in or modification of the law affecting the pure conveyancing matters of which the present volume treats. The controversies aroused by the passing of the Town and Country Planning Act, 1947, and particularly by the views of the effects thereof associated with the late Harold Potter have died down, partly as a result of the experience gained in the interval by conveyancers in applying the provisions of the Act but more importantly by the "denationalisation" of user rights effected by subsequent amending Acts. This may to some extent have rendered obsolete some of the precedents dealing with Town and Country Planning matters, which have been retained in the present edition of *Prideaux*, but it is perhaps too early to dismiss any such precedents out of hand.

If, however, there have been no great changes in the formally legal aspects of conveyancing, the same cannot be said of the practical aspects. Two important developments have occurred in this sphere. The first is the extension of compulsory land registration and the prospects of still further extensions. The second is the increase in popularity of the sale of flats, freehold and leasehold.

In both these instances, the present volume is somewhat disappointing. As regards registered land, though precedents of the simpler straightforward kind are to be found, they are very widely scattered throughout the text. Future editors might consider the advisability of gathering these together in one section and adding to their number to cover transfers on the register and transfers of parts and other less simple but still common types of transactions.

As regards sales of flats, there can be little doubt that such sales have come to stay and it is, therefore, to be regretted that there is only one effective form in a book which contains close on 600 pages of precedents. It is true that flat sales give rise to a wide range of many difficult legal and practical problems; and the full social and other effects thereof, which are not yet to any great extent worked out, may eventually demand the attention of the legislature, but this does not exonerate the conveyancer from tackling some of the more immediately apparent difficulties and problems.

Apart from these two gaps, the present *Prideaux* appears to cater admirably for every ordinary need and retains all the fine features of previous editions. Chapter 1 no longer embodies a general summary of the provisions of the 1925 legislation, and rightly so, since the summary was not very illuminating and in any event practitioners have by now become sufficiently familiar with the 1925 legislation. Instead, Chapter 1 deals very adequately with the effects of the transitional provisions which are still of practical importance. The rest of the introductory text has been retained and is well worth while reperusing. It may be noted, however, that the important decision upon the form of memorandum in *Timmins* v. *Moreland Street Property Co., Ltd.* is not referred to, though it is only fair to say that it may have been too recent for inclusion.

The value of a book of precedents can only be gauged by constant use. This volume sets out on its course with two great advantages, its proven

usefulness for over a century, bringing it to its 25th edition, and the wide and deep learning and experience of its editors. Unfortunately, one of the editors—T. K. Wigan, to whom the present reviewer owes a great deal—is no longer with us, but the loss is greatly mitigated by this permanent record.

P. E.

Tax Planning With Precedents. By D. C. Potter, LL.B., and H. H. Monroe, M.A., Barristers-at-Law, assisted by Stewart Bates, M.A., Barrister-at-Law. London: Sweet & Maxwell, Ltd. xxxii and 439 pp. (£2 10s.)

The changes effected by the 1957 and 1958 Finance Acts have caused considerable rewriting to be carried out in this edition, which must be wholly welcomed. Your reviewer fully associated himself with the comments of the authors in their preface, save the desirability of estate duty questions being considered by the Special Commissioners. The unintelligibility of tax legislation is such that the authors' comments should, perhaps, have been more vitriolic, for the Finance Bill, 1959, now published indicates that the problems of interpretation of taxing statutes are destined to cause the taxpayer expense and provide the courts with virtually insoluble problems to an increasing extent.

In addition to the changes effected by the Finance Acts, we have had the Variation of Trusts Act, 1958, which has opened a vast new field for enabling the subject to put a brake upon the inevitable acceptance of the Inland Revenue as the ultimate beneficiary of every trust. The chapter on Variation of Existing Settlements is thus of considerable interest, giving an up-to-date view, though rather brief, of some of the most difficult parts of tax planning. It is hoped that the considerable flow of decisions already made under the 1958 Act establishing a practice on such applications will be speedily dealt with by the authors producing a supplement, keeping their initial comments up to date. There are two points upon which one looks in vain for the considered comments of the authors: first, the manner of valuation of respective interests when estate duty saving is taken into account, a matter normally, though without any apparent reason, left to the inspired guess of the actuary valuing the interests capable of scientific valuation; secondly, and allied to the first, the duties of those advising infants when the splitting of the fund is clearly to their benefit, but would be even more so if they collected a larger slice of the duty saving. The chapter concludes with a number of useful precedents, a new addition being a Deed of Partition, an effective method in many circumstances of saving stamp duty whilst not increasing the estate duty risk. The authors apparently consider purchase of the reversion of the life tenant as a dead letter: this is not so, for it remains of importance in that it enables the reversioner to be freed from accountability for any duty.

The chapter on Partnerships has been largely rewritten. A useful precedent is given for the case of a man taking his children into partnership, with the object of saving estate duty on his death on part of the value of the business, Another new precedent is one enabling the widow of a deceased partner who becomes entitled to a share on his death to surrender that share in return for an assured income during the remainder of her life. The dangers inherent in such a scheme are explained in the notes to that precedent. Another interesting new precedent appears at the end of the chapter on Wills: this provides for a testator who wishes to leave a legacy to a child, but to take account of the fact that such child may by the time it receives the legacy, be embarrassed either for estate duty or tax purposes by receiving it. The precedent is of a legacy couched in such a form that the child would be able to take the legacy or deal with the property left for his own benefit if

desired, but if not so desired, to enable it to accrue to his children and thus benefit him indirectly.

As usual, the volume has been well produced by the publishers, though persons using the book principally for its precedents would be grateful for rather more blank space surrounding the various draft clauses.

As new editions will undoubtedly appear at regular intervals in the future, despite the somewhat despairing cry of the authors at the end of their preface, it is suggested, as in the review of the previous edition, that the legislature being unable or unwilling to abolish Schedule A, an explanation of some of the mysteries surrounding that levy might well find its place in Tax Planning. The problems met regularly by conveyancers in these days of exploitation of property by division into the smallest possible parcels, both horizontally and vertically, are considerable.

D. R. S.

The Dictionary of English Law. General editor: Earl Jowitt; editor: Clifford Walsh, ll.m., Solicitor. Sweet & Maxwell, Ltd. 1,905 pp. (Either one or two volumes £8 8s.)

There is a substantial body who regard dictionaries as the most fascinating type of literature. The reader pulls out *Fowler* or *Roget* to look up one specific point and some time later finds himself engrossed in other passages remote from the original point. So we wandered through the *Dictionary* marvelling how only two names could appear as editors on the title page. We were sorry to discern in our ignorance that *De minimis non curat lex* does not mean "Lawyers do not care for small portions," but pleased to add "patibulated" meaning "highly-strung" to our vocabulary. Rather surprisingly a number of words, "structure," "window," "lift," "roof," do not make the grade at all. The law as to vaccination is surely out of date; under "commorientes" the intestacy position is not dealt with; there is very little help given on columns of air to be found under "*Cujus est solum*," etc., or on the law relating to percolation of water. The entry on the easement of eavesdrop implies wrongly that it is only a Scottish easement. Corn rents are still to be found, but the reader might not guess it.

It is always fun, though not fair, to pick holes rather than point to the good things. On the older terms, so far as we could judge, the *Dictionary* shows a very high standard indeed and many modern terms such as "flat," "bungalow" and "living accommodation" (a poor entry) find their places. It is sometimes a little difficult to track down the correct entry. Why is "Tenant from year to year" not put near to "Tenancy from year to year," instead of the latter being under "Year to year, Tenancy from"? Incidentally, is a monthly or weekly tenancy a legal estate? The Law of Property Act, 1925, includes a tenancy from year to year in the definition of a "term of years absolute," but not other periodic tenancies. The Landlord and Tenant Act, 1954, also deals specifically with tenancies from year to year, though not other periodic tenancies. Oddly enough, other standard works do not deal with the point.

This work is the progeny of Byrne's *Law Dictionary* and Wharton's *Law Lexicon*. So far as it is a dictionary, there is no doubt that it does its task very well; so far as it is an encyclopaedia some reservations must be made. It is frankly impossible to produce an encyclopaedia to satisfy practising lawyers in the space available, though in very many cases there are quite brilliant summaries and some helpful and original lines of inquiry are finger-posted. He would have a dull and pedestrian mind who would not find it stimulating.

E. F. G.

Limitation of Actions. By Michael Franks, m.a., Barrister-at-Law. Sweet & Maxwell, Ltd. lix, 311 and (index) 11 pp. (£3 3s.)

Mr. Franks has undoubtedly put a great deal of hard work into this book and has cited a mass of authority. His arrangement is unusual: Part II, the Limitation Rules, which is the principal part of the work is divided into sub-heads in alphabetical order, for example, administration of estates, charities, companies, land, mortgages, principal sums secured on property. With respect, this scheme does not lead to a coherent presentation of the subject. The order in the 1939 Act, although not ideal, is not unsound. The failure to treat the barring of rights as a form of acquisitive prescription and different in kind from the barring of remedies leads to trouble. *Lewis* v. *Plunket* [1937] Ch. 306, which decided that a mortgagor is entitled to have his title deeds back when the mortgagees' claim is barred, a decision of great importance as showing the substantive rights acquired on the barring of title to land, is briefly noted in a negative sense in a footnote under the sub-head "Land" and does not appear under "Mortgage." The fact that a lessee acquires title for his lessor also shows the substantive effect of barring rights.

At times the author seems to be overwhelmed by the authorities. For example, it is a little difficult to ascertain what the author's views with regard to concealed fraud are. Sometimes the standard of writing slips a little—a plural verb for a singular subject, the ugly "arbitrational" for "arbitral"—and some passages are obscure. A footnote "See Index" is not very helpful.

With reservations as to the scheme of the work and these minor lapses, the book can be recommended. It appears to cover the ground very fully, including pleading and practice. An appendix sets out the 1939 Act and the Law Reform (Limitation of Actions, etc.) Act, 1954.

E. F. G.

Gibson's Conveyancing. 18th ed. By R. H. Kersley, m.a., ll.m., Solicitor. The Law Notes Lending Library, Ltd. cxxvii, 772 and (index) 73 pp. (£4.)

Gibson's Conveyancing has no rival: every articled clerk reads it and studies it. The chances are that, after taking his Final, he will acquire an affection for it. Certainly solicitors refer to it on points of practice. The task of the editor is difficult in the extreme, for the book must cover the whole subject, not merely in outline, but in reasonable detail; at the same time its size is limited by the amount a student can be expected to absorb. It is interesting to note that this edition is only seventy pages larger than the 1933 edition, but it is, in our opinion, far superior. Mr. Kersley, who did a valuable service in giving a thorough overhaul in the 17th edition, has revised the book carefully and brought it up to date. The necessity for compactness is bound to limit its utility to the practitioner to a certain extent. Statements tend to be dogmatic and there is not always room to add a cautionary warning about some doubtful decisions. Nevertheless, references in footnotes to current literature and the Law Society's rulings help to maintain its usefulness. We wonder whether a little more room could be made for covenants in leases and registered land, by excising some of the substantive law on strict settlements. Our general impression is that the high standard of the 17th edition has been fully maintained. Eighteen editions are a fine record. In the interests of good conveyancing, long may *Gibson* flourish.

J. H. G.